

**IN THE MATTER OF:
TWIN FARMS CLUB, INC.
and
T-MOBILE NORTHEAST, LLC**

Board of Appeals Case No. S-2818
(OZAH No. 12-01)

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I. STATEMENT OF THE CASE

Petition No. S-2818, was filed on June 22, 2011, by Twin Farms Club, Inc.¹ (Twin Farms) and T-Mobile Northeast LLC (T-Mobile). Petitioners seek a special exception, pursuant to §59-G-2.58 of the Zoning Ordinance, to construct an unmanned wireless telecommunications facility on a 125-foot tall monopole, designed as a flagpole, with antennas centered at 120-feet inside the pole, and an associated equipment area, located at 1200 Fairland Road, Silver Spring, Maryland. Petitioner is requesting eight (8) reductions of the minimum required setback from the nearest dwellings as well as one reduction in the minimum setback from the surrounding property lines.

The property is located in the Upper Paint Branch Special Exception Area (SPA), and it is subject to the impervious surface restrictions of § 59-C-18.152 of the Environmental Overlay Zone. As a result, Petitioner was required to and did submit an approved Preliminary/Final Water Quality Plan (SPA Water Quality Plan). This case will be decided by the Board of Appeals in conjunction with a request for an administrative modification of the existing special exception, S-390 [CBA-1280, CBA-605], on the site.² Exhibit 1.

The Montgomery County Transmission Facility Coordinating Group (TFCG), also known as the “Tower Committee,” initially reviewed the application (200809-20) in 2008 and recommended denial because the application did not meet all the zoning requirements necessary for a special exception. The Tower Committee reviewed the application (201103-04) a second time, based on Petitioner’s request and need for a recommendation that was no more than 90 days old, on May 4,

¹ The co-applicant is also referred to as the “Twin Farms Swim Club”.

² On March 21, 1958, the Board of Appeals (BOA) approved special exception CBA-605, granting co-applicant Twin Farms Club, Inc. permission to construct and operate a community swimming pool on the subject property. On August 14, 1962, the BOA approved special exception CBA-1280 to permit the continued operation of the swimming pool, and the addition of all-weather tennis courts. On April 23, 1975, the BOA approved special exception S-390, to allow the installation of lights on the existing tennis courts. On April 23, 2004, the BOA approved modifications to special exception S-390 [CBA-1280 and CBA-605] to permit the addition of a basketball court and patio, together with site lighting changes. Twin Farms Club, Inc. requests that the Board further modify special exception S-390 to permit the development of the subject telecommunications facility.

2011. In its May 4, 2011, review, the Committee recommended approval of the proposed facility conditioned on approval by the Board of Appeals for a special exception and a reduction in setback requirements.³ Exhibits 7, 17 (b) and 77 (a).

On June 30, 2011, the Board of Appeals issued a notice that a hearing in this matter would be held before the Office of Zoning and Administrative Hearings on September 30, 2011. Exhibit 15 (a).

On August 19, 2011, Petitioner submitted a letter requesting leave to amend the petition to reflect comments from Technical Staff and advised that Petitioner was awaiting final review of the SPA Water Quality Plan by the Planning Board. On August 26, 2011⁴, and September 26, 2011,⁵ Petitioner submitted revised and additional documentation to support the amended Petition. The Planning Board approved the SPA Water Quality Plan on September 15, 2011.

Technical Staff in its report dated September 27, 2011, recommended denial of the special exception and the requested reduction in setback requirements. Exhibit 68.⁶ Technical Staff “evaluated the tower request by analyzing the potential visual impacts based on location, vegetation, topography and the nine requested setback reductions [and] determined that there are two non-inherent adverse affects associated with this request: site size and number of setback requests.” Exhibit 68, p. 5. Technical Staff found that the “site is extremely narrow and does not

³ The minutes from the TFCG on May 4, 2011, noted that “in the past the TFCG sometimes voted not to recommend an application that did not meet all the zoning requirements necessary for a special exception.” The minutes from the 2008 TFCG meeting clearly reflect that this was the practice when the TFCG initially recommended denial of Petitioners’ application. Since that time, the chair of the Tower Committee stated that the “more current practice for the TFCG on these kind of applications is to recommend conditioned approval on approval by the Board of Appeals for a special exception and a reduction in setback requirements.” Exhibit 17 (b)

⁴ On August 26, 2011, Petitioner submitted records for the TFGC, a revised statement of justification and a revised special exception plan. Exhibit 17 (a)-(c).

⁵ On September 26, 2011, Petitioner submitted Technical Staff’s report on the PFWQP, witness resumes, Towair Determination Results, Affidavit from William O’Brien, Facility Registration Program, Fact Sheet, Ericson Radio Base Station Cabinet & Chemical Safety Information, NorthStar Material Safety Data Sheet, and Site Compliance Report. Exhibit 64.

⁶ The Technical Staff report is frequently quoted and paraphrased herein.

offer appropriate buffers from the east to west property line in order to visually reduce the bulk or scale of the tower especially due to [the] proximity to some of the adjoining houses where the greatest setback reductions are requested.” Exhibit 68, p. 3. Technical Staff also determined that “there is no instance on this site where the applicant could meet the 300-foot dwelling setback without requesting reductions of the required setback minimums [because] the farther back from the road (north) the tower would move, the higher in topography and the closer the tower would move to lots 3 and 4.” Thus, Technical Staff concluded that “the non-inherent adverse affects combined with the inherent adverse impacts is sufficient to warrant denial.” Technical Staff also found the proposed special exception was inconsistent with the White Oak Master Plan. Exhibit 68, p. 5

A public hearing was convened as scheduled on September 30, 2011. Petitioner called three witnesses, and five individuals testified in support of the petition. Numerous letters of support (Exhibits 19-47, 49, 5863, 69-70, and 75) and one letter of opposition (Exhibit 48) to the Petition were received prior to the hearing. There were no other participants at the hearing, which concluded on the same day.

The record was held open until October 21, 2011, to allow 15 days for public comment to Petitioner’s Motion to Amend the Petition and other documents, including the Planning Board approval of the PFWQP, which Petitioner submitted on September 26, 2011. Petitioner requested an additional four days for rebuttal. A Notice of Motion to Amend was filed on October 5, 2011.

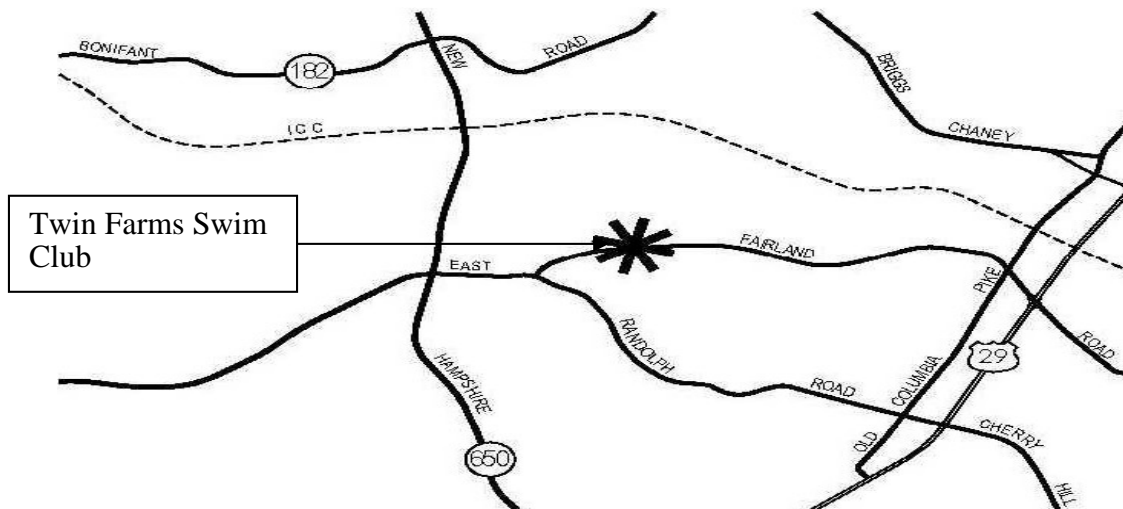
At the hearing, the Hearing Examiner noted that the supporting documentation (2008 application, Tower Committee report and Tower Coordinator recommendation) referred to in the May 4, 2011, Tower Committee report (Exhibit 7) was missing from the record. As requested, Petitioner supplied this information on October 7, 2011. Exhibit 77.

The record closed as scheduled on October 21, 2011.

II. FACTUAL BACKGROUND

A. The Subject Property and the General Neighborhood

As noted above, the subject property is located at 1200 Fairland Road and owned by co-Applicant, Twin Farms. The property consists of approximately 3.72 acres of land (Lot N806) zoned R-200 and located between New Hampshire Avenue and Route 29, Columbia Pike, as shown below on the vicinity map provided in Technical Staff's report:

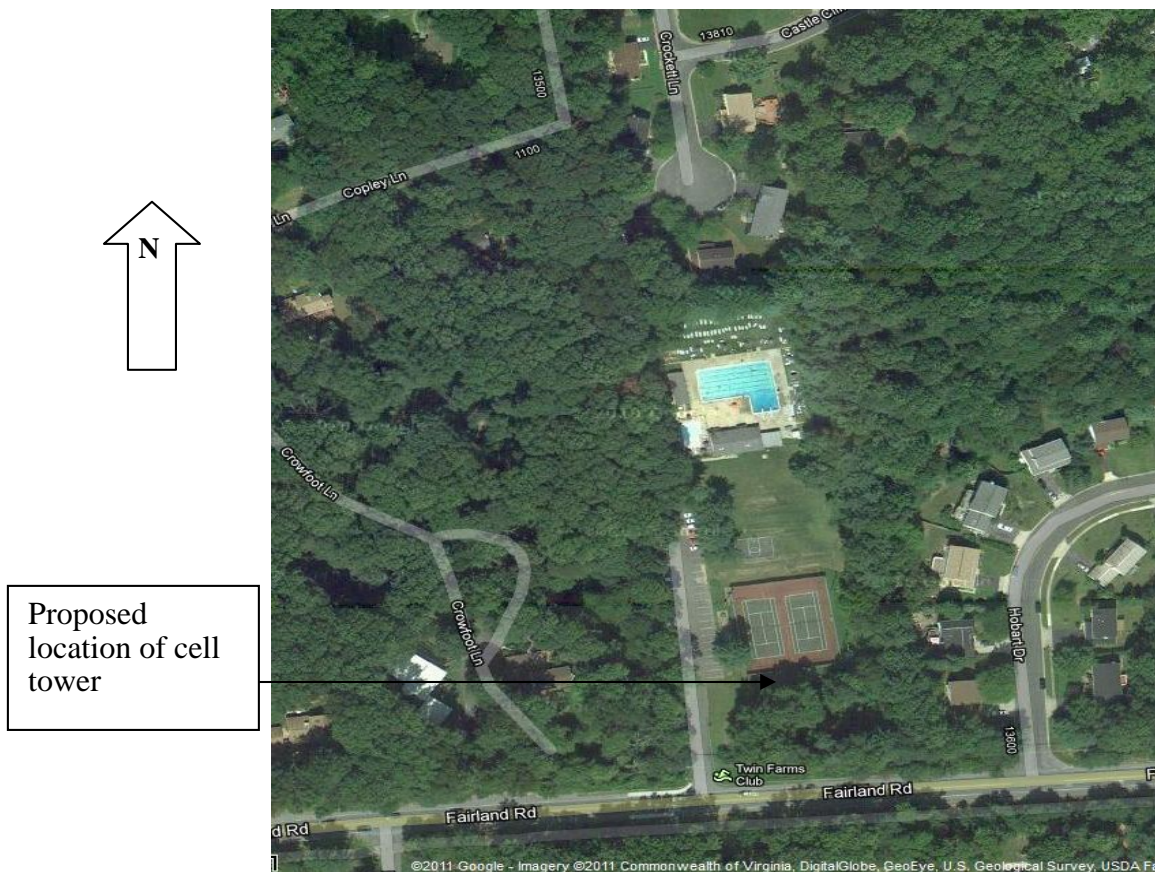


Technical Staff report, Exhibit 68, p. 3:

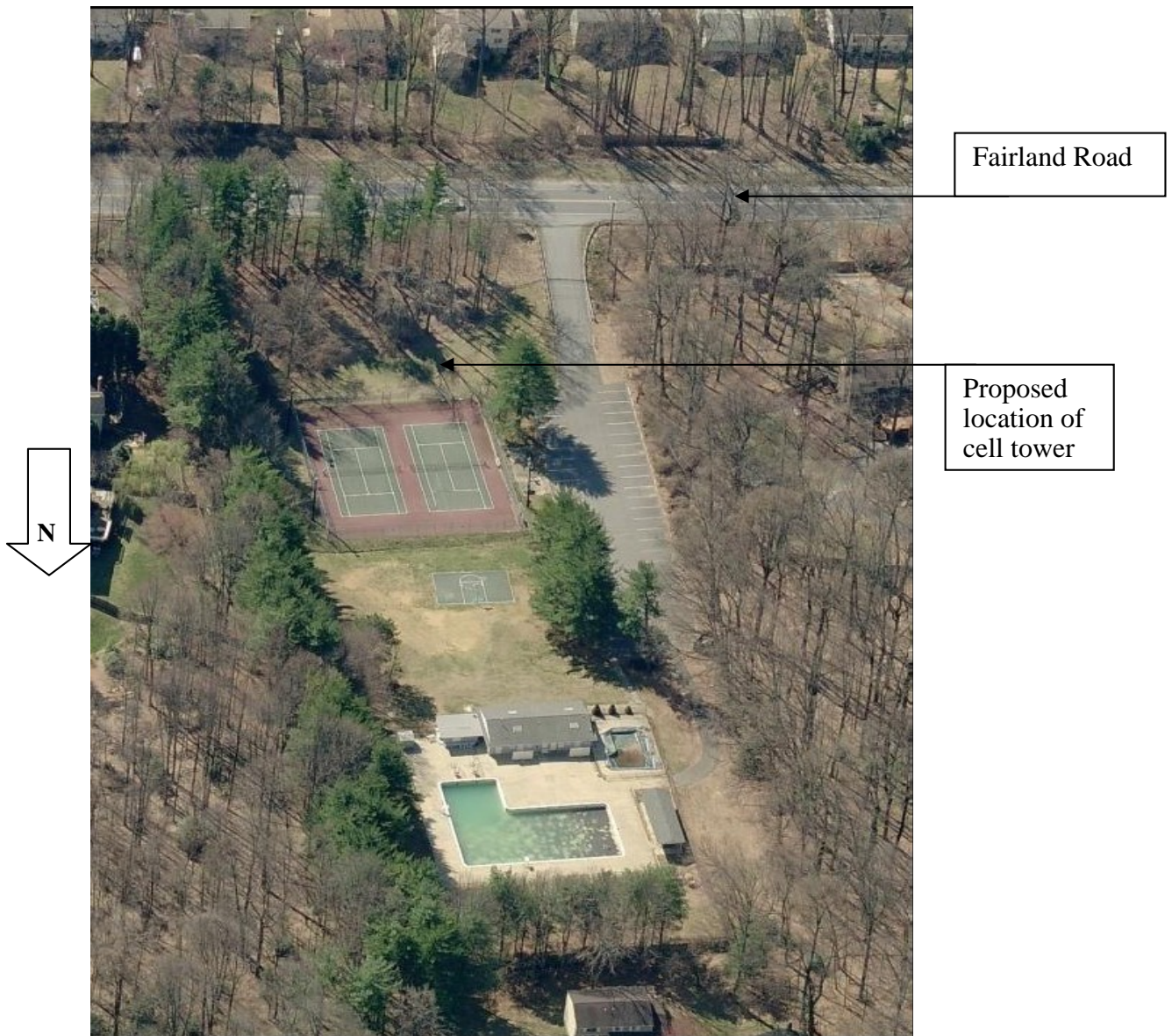
This site has a relatively steep grade, with 0.16 acres of hedgerow along Fairland Road. There is an existing special exception on-site for a pool and tennis club use.⁷ There are no sidewalks along Fairland Road. Access to this site is via Fairland Road. . . . The site is located within the Upper Paint Branch Special Protection Area.

⁷ Technical Staff reported “[t]he special exception on this site was approved in March 1958, Board of Appeals Case No. 605 [and] was amended twice: in August 1962; and January of 1975, Board of Appeals Case No. 1280 and S-309, respectively.” Exhibit 68, p. 3.

The property is currently in use as a swim club and is improved with two swimming pools, a bath house, pool pad, tennis courts, basketball court, picnic area,⁸ parking lot and sidewalk. The following aerial photographs of the property are shown below to illustrate the existing tree cover and vegetation in the summer (Exhibit 72) and winter (Exhibit 65 (a)):

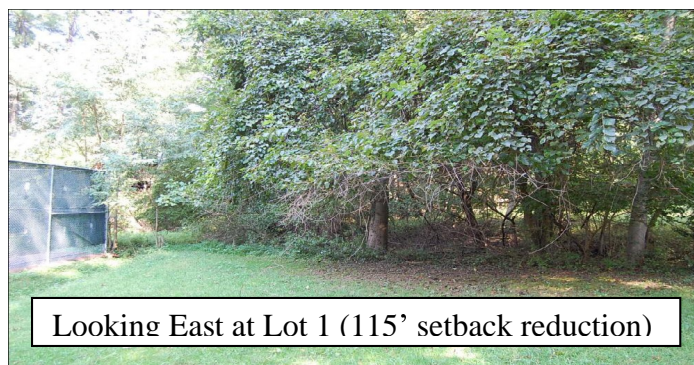
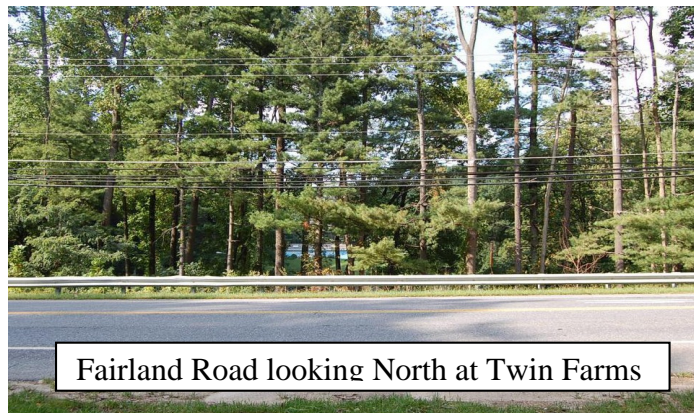


⁸ It is proposed that the picnic area will be removed as part of the special exception in order to meet the impervious surface restrictions set forth in § 59-C-18.152 of the Environmental Overlay Zone. Exhibit 65 (a).

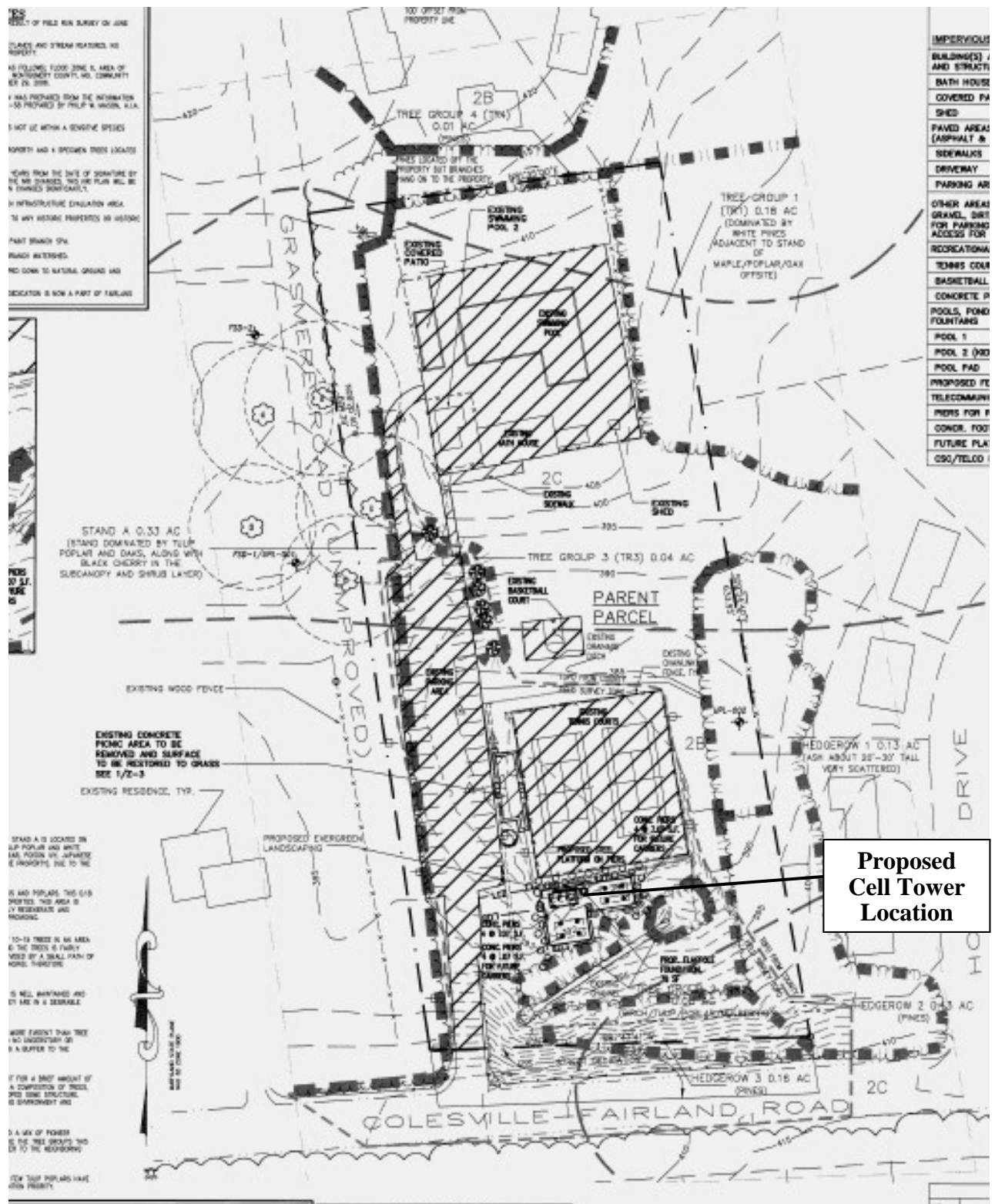


The proposed facility will be located between the tennis courts and Fairland Road in an area where the ground elevation is approximately 20 feet below street level. Access to the property is from Fairland Road via a paved driveway located on the west side of the property which slopes down to an existing parking lot. The following photographs were provided in the Technical Staff report, Exhibit 68, Attachment 9:





The approved SPA Water Quality Plan, reproduced below, best illustrates the topography, existing vegetation and other environmental features of the property, as well as the location of the proposed facility, Exhibit 17(c-map Z-7):



FSD NARRATIVE**STAND A**

STAND A IS LOCATED ON THE WESTERN BORDER OF THE PROPERTY, IN THE NORTHERN CORNER ADJACENT TO THE POOL. A MAJORITY OF STAND A IS LOCATED ON THE ADJACENT PROPERTY. THERE IS ONLY 0.33 AC OF STAND A LOCATED ON THE PROPERTY. THE STAND IS DOMINATED BY 20-29.9" TULIP POPLAR AND WHITE OAK. THIS MID-SUCCESIONAL UPLAND FOREST CONTAINS IMMATURE CANOPY SPECIES IN THE UNDERSTORY LAYER. ENGLISH IVY, GREENBRIAR, POISON IVY, JAPANESE HONEYSUCKLE, AND PERIWINKLE DOMINATE THE HERBACEOUS LAYER. THERE ARE FIVE SPECIMEN TREES IN STAND A (BOTH ON AND OFF THE PROPERTY). DUE TO THE LIMITED AMOUNT OF STAND A THAT IS LOCATED ON THE PROPERTY RETENTION PRIORITY FOR THIS STAND IS LOW.

TREE GROUP 1

TREE GROUP 1 IS LOCATED IN THE NORTHEAST CORNER OF THE PROPERTY AND LIES ADJACENT TO AN OFF-SITE STAND OF MAPLES, OAKS AND POPLARS. THIS 0.18 AC GROUP OF 12-19.9" PINES APPEARS TO BE PLANTED ABOUT 15-20 YEARS AGO AS A LANDSCAPE BUFFER TO THE SURROUNDING PROPERTIES. THIS AREA IS STARTING TO DEVELOP AN HERBACEOUS LAYER (MOSTLY GREENBRIAR) AND COULD QUALIFY AS A FOREST STAND IF ALLOWED TO NATURALLY REGENERATE AND DEVELOP SOME DIVERSITY OVER THE NEXT COUPLE YEARS. RETENTION OF THIS AREA IS MODERATE DUE TO THE BUFFER THE PINES ARE PROVIDING.

TREE GROUP 2

TREE GROUP 2 IS LOCATED SOUTH OF THE TENNIS COURTS AND LOCATED ALONG A SMALL DRAINAGE SWALE. THERE ARE APPROXIMATELY 10-15 TREES IN AN AREA OF 0.06 AC. THE GROUP IS COMPOSED OF MULBERRY, TULIP POPLAR AND BIRCH A MAJORITY OF WHICH ARE 6-11.9". THE AREA AROUND THE TREES IS FAIRLY WELL MAINTAINED, BUT THERE IS A SCATTERED HERBACEOUS LAYER (MOSTLY GREENBRIAR). THE TWO SECTIONS OF THE GROUPING ARE DIVIDED BY A SMALL PATH OF MAINTAINED GRASS. THIS TREE GROUP IS PROVIDING LITTLE BENEFIT TO THE SURROUNDING ENVIRONMENT AND IS NOT AESTHETICALLY PLEASING; THEREFORE RETENTION OF THIS AREA IS LOW.

TREE GROUP 3

TREE GROUP 3 IS ALSO A 0.04 AC GROUP OF PINES LOCATED NORTH OF THE BASKETBALL COURT, ALONG THE PARKING LOT. THIS AREA IS WELL MAINTAINED AND THE 12-19.9" PINES APPEAR TO BE IN GOOD CONDITION. DUE TO THE FACT THAT THESE TREES WERE PLANTED IT IS PRESUMED THAT THEY ARE IN A DESIRABLE LOCATION AND THEREFORE THERE RETENTION IS AT LEAST MODERATE.

TREE GROUP 4

TREE GROUP 4 (0.01 AC), LOCATED ON THE NORTHERN BOUNDARY OF THE PROPERTY, IS VERY SIMILAR TO TREE GROUP 1 AND A LITTLE MORE EVIDENT THAN TREE GROUP 3. HOWEVER THESE PINES ARE LESS DENSE AND MAINTENANCE UNDER THE TREES IS A LITTLE MORE EVIDENT. THERE IS LITTLE TO NO UNDERSTORY OR HERBACEOUS LAYER. THE PINES ARE IN THE 12-19.9" CLASS AND APPEAR TO BE IN GOOD CONDITION. THESE TREES ARE ALSO PROVIDING A BUFFER TO THE NEIGHBORING PROPERTY AND THEREFORE HAVE A MODERATE RETENTION VALUE.

HEDGEROW 1

HEDGEROW 1 IS LOCATED IN AN 0.13 AC AREA ON THE EASTERN BORDER THAT ACCUMULATES HYDROLOGY FROM THE SITE AND RETAINS IT FOR A BRIEF AMOUNT OF TIME. THE INCREASED AMOUNT OF HYDROLOGY HAS ENCOURAGED THE GROWTH OF 8-11.9" ASH TREES AND THOSE ARE SURROUNDED BY A COMPOSITION OF TREES, SHRUBS, AND PLANTS SIMILAR TO THOSE OF STAND A. THIS AREA IS MORE NATURAL THAN THE PLANTED TREE GROUPS AND HAS DEVELOPED SOME STRUCTURE. WHILE THIS AREA DOES NOT QUALIFY AS A WETLAND IT IS PROVIDING FUNCTIONS AND VALUES THAT ARE BENEFICIAL TO THE SURROUNDING ENVIRONMENT AND THEREFORE THE RETENTION VALUE OF THIS AREA IS MODERATE.

HEDGEROW 2

HEDGEROW 2 IS LOCATED IN THE SOUTH EAST CORNER OF THE PROPERTY. THIS 0.13 AC AREA IS A MIX OF PLANTED 12-19.9" PINES AND A MIX OF PIONEER SPECIES IN THE UNDERSTORY AND HERBACEOUS LAYER (INCLUDING IMMATURE TULIP POPLAR, OAKS, GREENBRIAR, POISON IVY, ETC). UNLIKE THE TREE GROUPS THIS AREA RECEIVES LITTLE TO NO MAINTENANCE AND IS FURTHER ALONG IN REGENERATIVE PROCESS. THIS AREA IS PROVIDING A SMALL BUFFER TO THE NEIGHBORING DEVELOPMENT AND THEREFORE CAN BE CONSIDERED TO HAVE A LOW-MODERATE RETENTION PRIORITY.

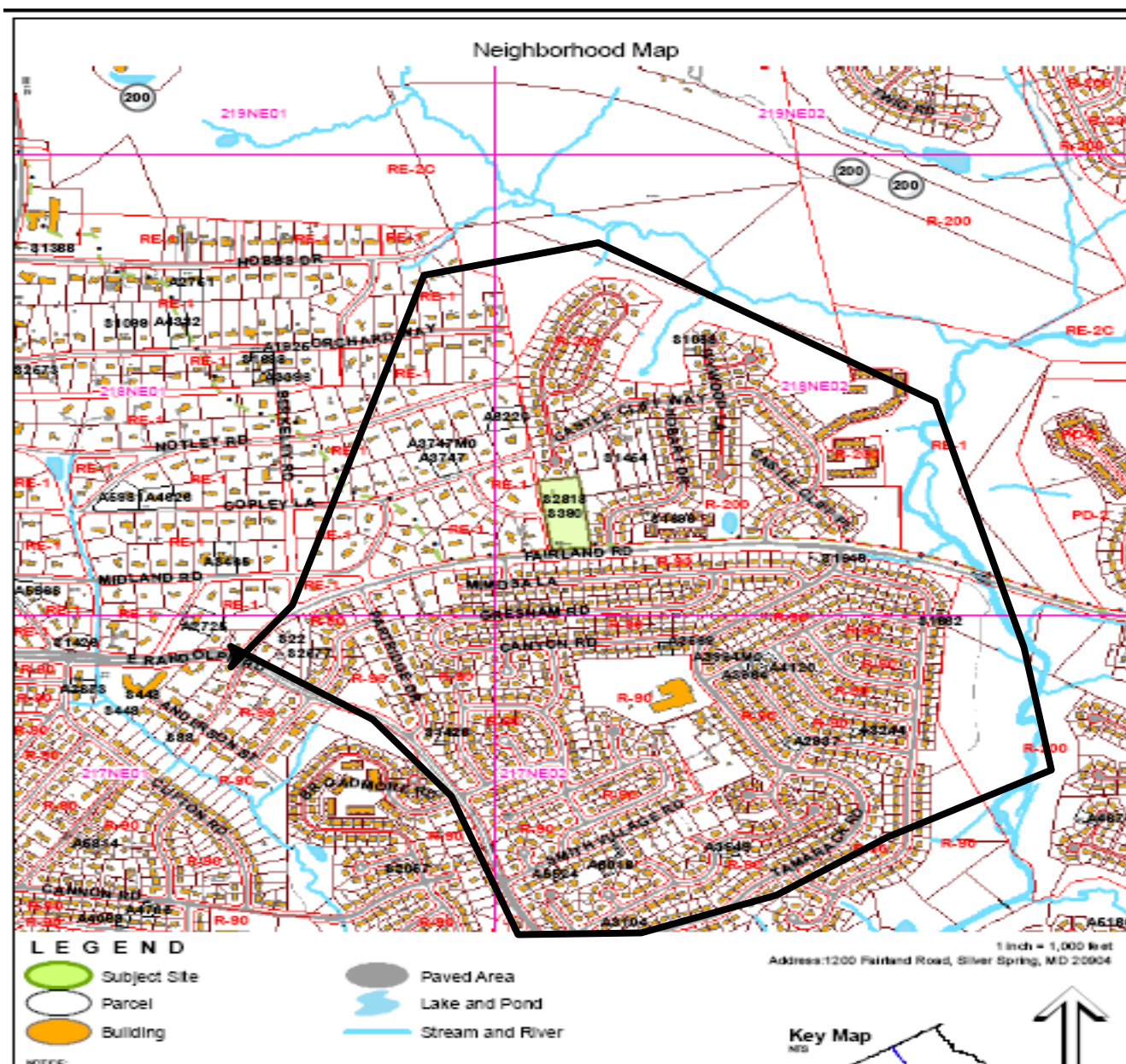
HEDGEROW 3

HEDGEROW 3 IS LOCATED ON THE SOUTH BORDER OF THE PROPERTY. THIS 0.16 AC AREA IS VERY SIMILAR TO HEDGEROW 2, EXCEPT THE FEW TULIP POPLARS HAVE REACHED MATURITY. THIS AREA IS ONLY PROVIDING A BUFFER TO FAIRLAND ROAD AND THEREFORE IS CONSIDERED TO HAVE A LOW RETENTION PRIORITY.

GENERAL NOTES

1. THE TOPOGRAPHY SHOWN ON THIS PLAN IS A RESULT OF FIELD RUN SURVEY ON JUNE 2008 AND COUNTY TOPO MAP.
2. THE PROPERTY WAS FIELD INVESTIGATED FOR WETLANDS AND STREAM FEATURES. NO WETLANDS OR STREAMS WERE IDENTIFIED ON THE PROPERTY.
3. THE FLOOD ZONE OF THE PROPOSED TOWER IS AS FOLLOWS: FLOOD ZONE X, AREA OF MINIMAL FLOODING. SOURCE, FEMA FLOOD MAP FOR MONTGOMERY COUNTY, MD. COMMUNITY PANEL NUMBER 240049 0360 D, REVISED, SEPTEMBER 29, 2006.
4. THE PROPERTY BOUNDARY SHOWN ON THIS PLAN WAS PREPARED FROM THE INFORMATION ON ALTERNATE SITE & GRADING PLAN DATED 5-12-58 PREPARED BY PHILIP W. MASON, A.J.A. AND FIELD RUN SURVEY.
5. ACCORDING TO MD MERLIN, THIS PROPERTY DOES NOT LIE WITHIN A SENSITIVE SPECIES REVIEW AREA.
6. THERE IS 1 SPECIMEN TREE LOCATED ON THE PROPERTY AND 4 SPECIMEN TREES LOCATED OFF PROPERTY. ALL TREES WERE FIELD SURVEYED.
7. ONCE APPROVED, THIS NRI/FSD IS VALID FOR 5 YEARS FROM THE DATE OF SIGNATURE BY STAFF, OR UNTIL INFORMATION USED TO PREPARE THE NRI CHANGES. THIS NRI PLAN WILL BE REQUIRED TO BE REVISED IF THE BASE INFORMATION CHANGES SIGNIFICANTLY.
8. THIS SITE DOES NOT LIE WITHIN A COUNTY GREEN INFRASTRUCTURE EVALUATION AREA.
9. THIS SITE DOES NOT CONTAIN OR LIE ADJACENT TO ANY HISTORIC PROPERTIES OR HISTORIC ROADS.
10. THE PROPERTY IS LOCATED WITHIN THE UPPER PAINT BRANCH SPA.
11. THE PROPERTY IS LOCATED WITHIN THE PAINT BRANCH WATERSHED.
12. SOME OF THE IMPERVIOUS AREA WILL BE STRIPPED DOWN TO NATURAL GROUND AND STABILIZED TO GET ADDITIONAL PERVIOUS AREA.
13. ACCORDING TO COUNTY MAPPING, THE STREET DEDICATION IS NOW A PART OF FAIRLAND ROAD RIGHT OF WAY.

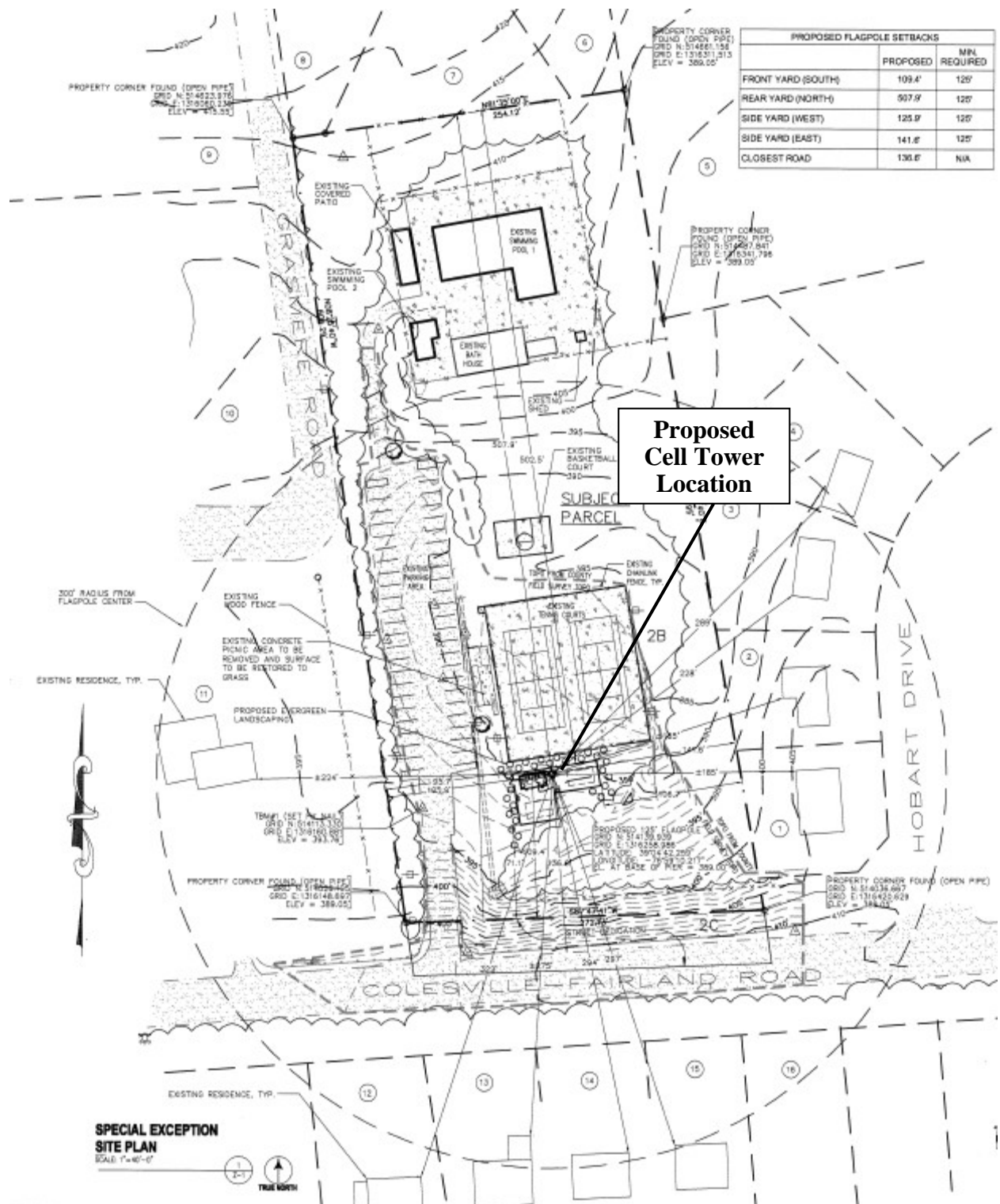
Technical Staff defined the general neighborhood as including those properties “bound[ed] by Tamarack Road to the south, the Upper Paint Branch Stream Buffer to the north and east and Randolph Road with its intersection with Fairland Road to the west.” Exhibit 68, p.3. The properties surrounding the Twin Farms site are zoned RE-1 to the west, R-90 to the south, and R-200 to the north and east. The area is depicted below in a map from Technical Staff:



Petitioner did not dispute this definition of the general neighborhood, and having no evidence to the contrary, the Hearing Examiner accepts Technical Staff's definition of the general neighborhood. Technical Staff identified six existing special exceptions (mostly accessory apartments) within the staff-defined neighborhood, including the underlying special exception use for a swim and tennis club on the Twin Farms property. Exhibit 68, p.3. The Hearing Examiner concurs with Technical Staff's conclusion that "[t]he limited impact of the telecommunications facility, which will produce no traffic, will not substantially increase the scope or intensity of special exceptions uses in the area." Exhibit 68, p. 7.

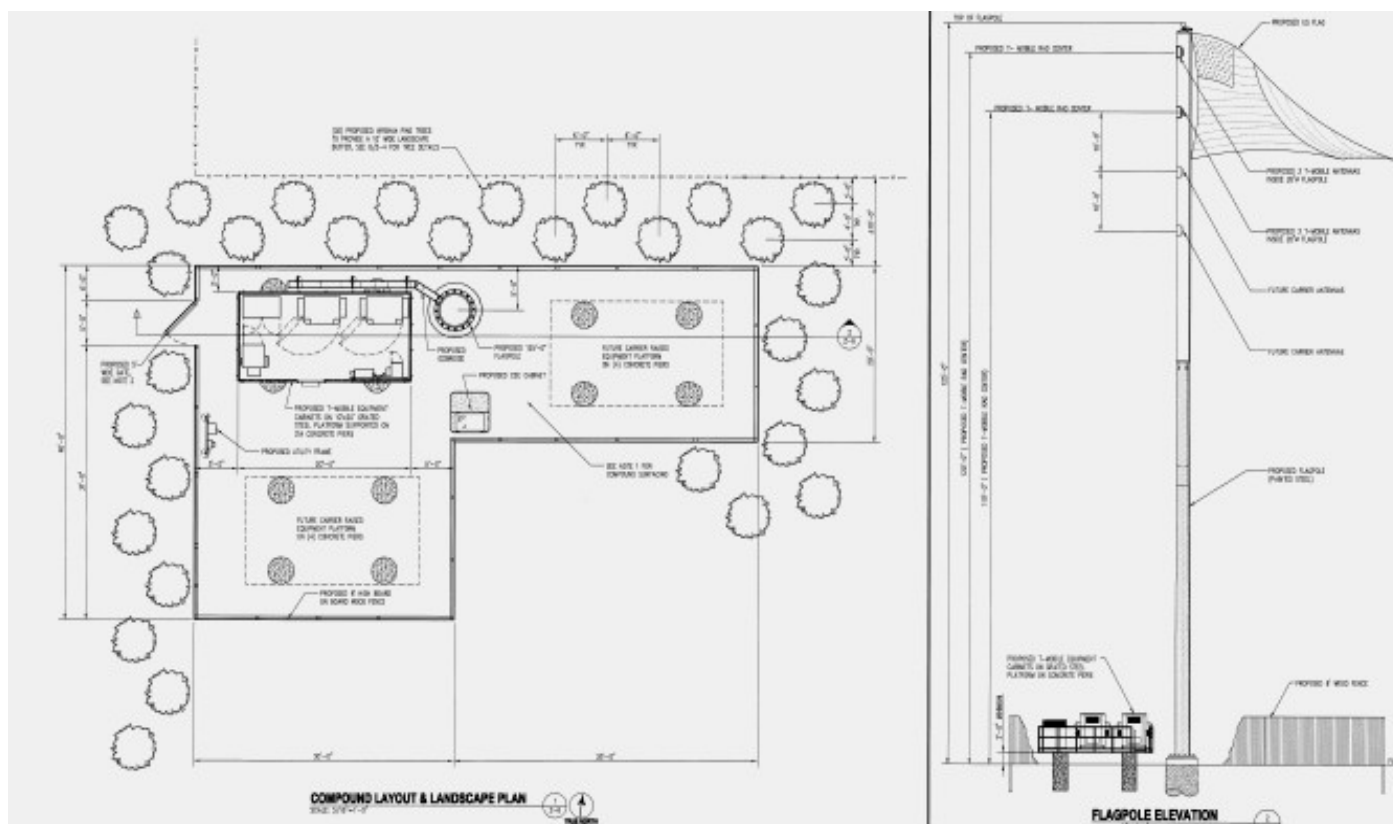
B. The Proposed Use

T-Mobile proposes a 125-foot tall, unmanned telecommunication facility, designed to be used as a flagpole with concealed antennas centered at 120 feet. Technical Staff advises that "the proposed structure is located on the lowest elevation of the property, on the south side of the tennis courts, and is screened by 0.16 acres of existing hedgerow of pines along the southern boundary." Exhibit 68, p. 7. A copy of the Revised Special Exception Site Plan (Site Plan) (Exhibit 17 (c), map Z-1), is set forth below:

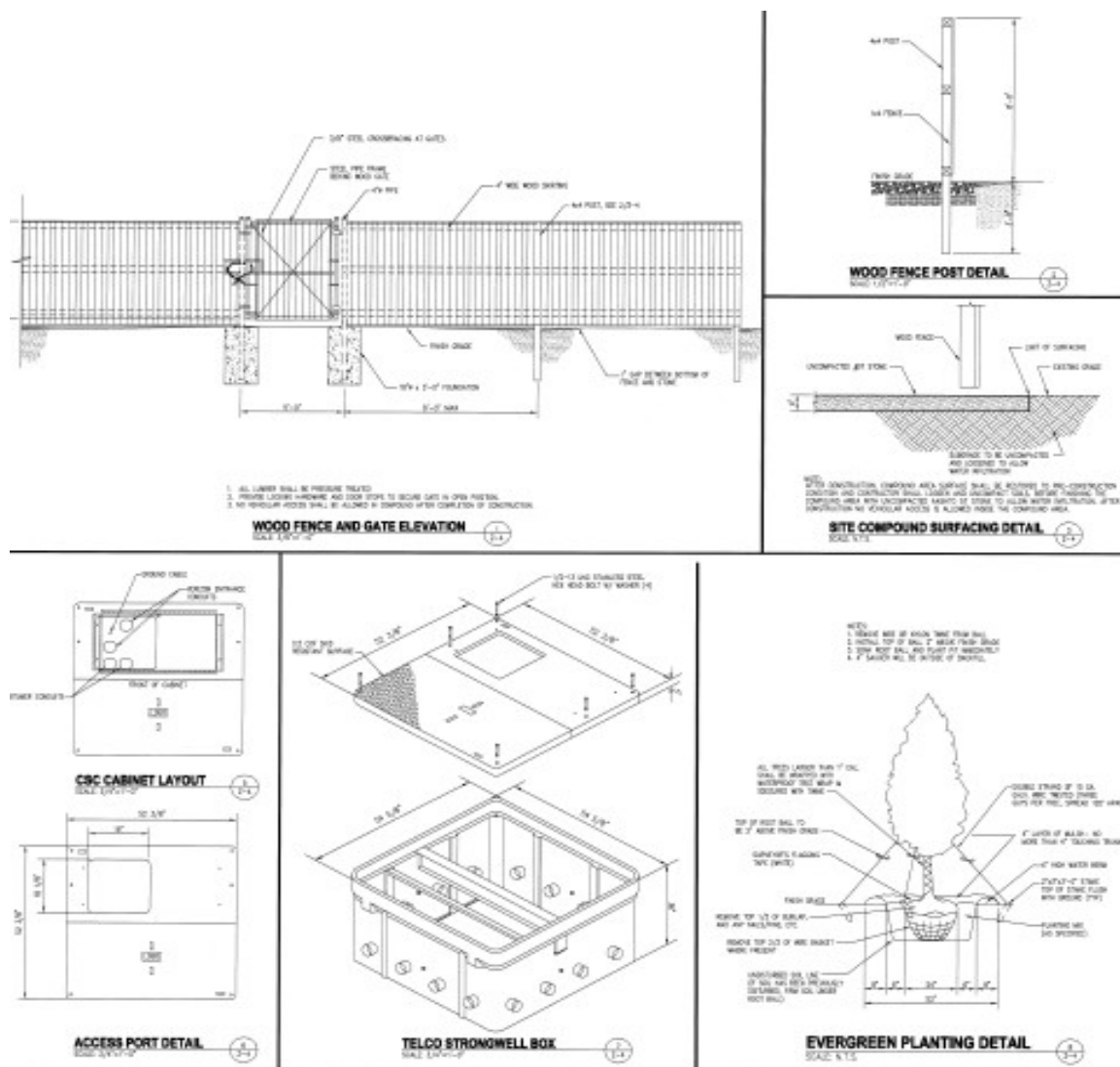


Technical Staff reports that the monopole, related equipment cabinets and ancillary electrical equipment will be contained within a 1,900 square-foot fenced compound (35 feet by 40 feet). Three equipment cabinets measuring approximately 63 inches high, 51 inches wide, and 37 inches deep will sit atop a grated steel platform (20 feet in length and 10 feet in width) on raised concrete piers. Technical Staff advises that the raised steel grated platform is “necessary to accommodate the impervious surface limits⁹ of the Upper Paint Branch Special Protection Area.” Exhibit 68, p. 2.

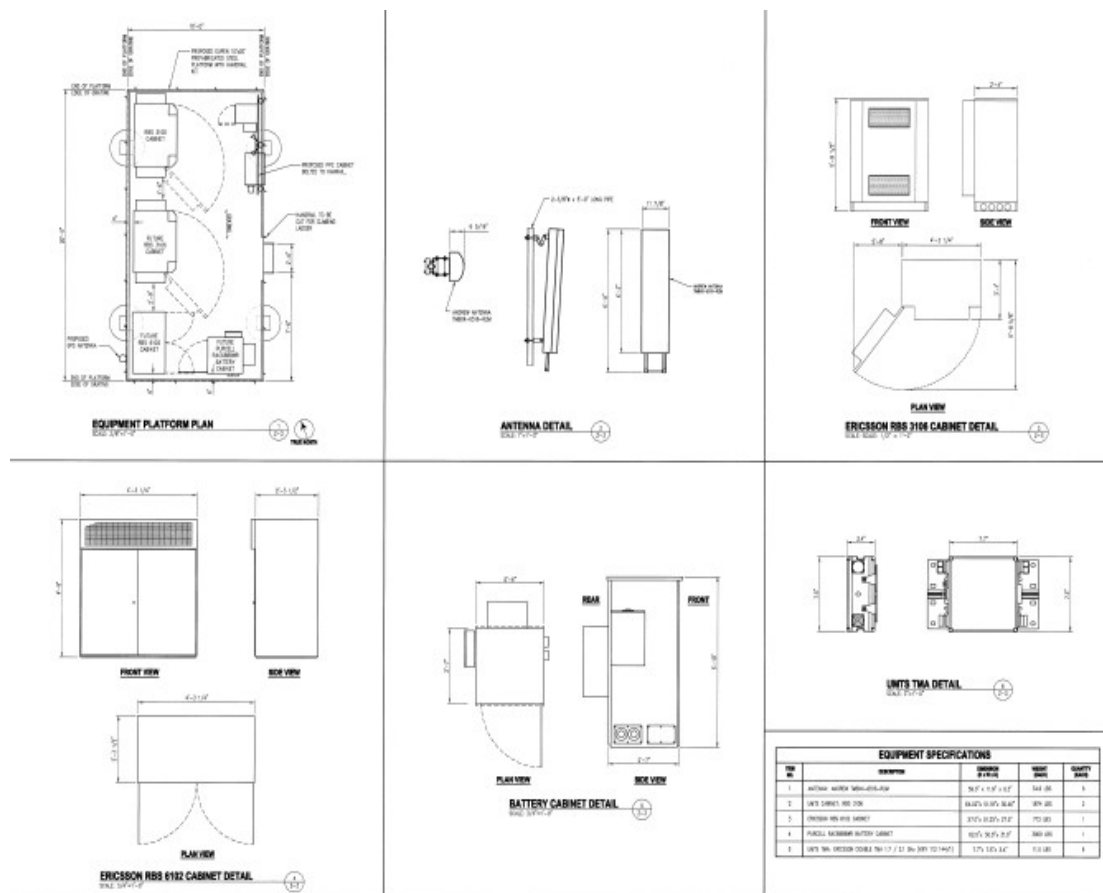
The equipment compound will be surrounded by an 8-foot tall board on board fence. Petitioner proposes to screen the west, north and east sides of the fence with 30 Virginia White Pines as shown on the Compound Layout and Landscape Plan reproduced below (Exhibit 17, map Z-6):



⁹ Technical Staff reported that “the impervious surface restrictions for development projects in the Upper Paint Branch SPA are set forth in Section 59-C-18.152 of the Environmental Overlay Zone.” Exhibit 65 (a).



As shown above, the proposed facility and equipment compound will be constructed with capacity to assist in co-locating up to two future wireless carriers without the need for further expansion or modification once constructed. Tr. 63-64. The equipment details are shown below, Exhibit 17 (c), map Z-5:



The proposed equipment cabinets¹⁰ will house the electronics for the structure and backup batteries. T-Mobile will use a NorthStar battery. Exhibit 65 (i) contains the specifications Fact Sheet for NorthStar batteries. The EPA classifies the NorthStar (NSB 100-FT) battery as spill proof. Exhibit 65 (h) is the specifications Fact Sheet that describes the chemical safety information with regard to the Ericsson radio base station (RBS) cabinets used in T-Mobile sites. According to the fact sheet, T-Mobile operates a network of over 1,500 radio base stations in the D.C. Metro area. Since 1999, when the network was first launched, T-Mobile has operated and maintained this equipment without a single failure or accident resulting in any chemical release. According to T-Mobile's

¹⁰ T-Mobile proposes to install two equipment cabinets with the possibility of adding a third cabinet in the future. Exhibit 65 (g).

statement, the chemicals contained in the T-Mobile radio base station cabinets do not pose any threat to the general public or the environment throughout an extreme range of operating conditions.

T-Mobile submitted an affidavit from its Real Estate Manager for the Washington and Baltimore Market, William O'Brien, that T-Mobile will submit an application for a Montgomery County High Use Facility Registration and that if T-Mobile does not use NorthStar batteries, it will use batteries with equivalent or better specifications than described in the Fact Sheets. Mr. O'Brien also affirmed that the "equipment is computer-controlled and monitored on a 24/7 basis." Exhibit 65(g).

The proposed facility and equipment compound is approximately 20 feet from the existing parking lot on the west side and can only be accessed by foot. Because the property is in an SPA, parking will be restricted to the parking lot "in order to limit the compactness of the soils." Exhibit 68, p. 11. The width of the fence gate to the equipment compound was reduced from 12-feet to 5-feet to prohibit vehicular access inside the compound. Exhibit 17 (c), map Z-6.

The proposed facility will be unmanned and in continuous operation 24 hours per day, seven days per week, with visits to the site only for emergency repairs or regular scheduled maintenance once per month. The proposed facility will not be lighted and will contain no signage except a sign not larger than 2 square feet affixed to the support structure or equipment shelter to identify the owner and maintenance service provider, as required by Zoning Ordinance § 59-G-2.58 (a)(8). Technical Staff has requested that the sign also include the phrase "No Parking".

Technical Staff found that "there are no discernible noise-related impacts associated with the proposed use, and the size, scale, and scope of the proposed use are not likely to result in traffic disruption or light intrusion." Transportation Staff found the special exception use meets the transportation related requirements (i.e., satisfies the LATR and PAMR tests) and "will have no adverse impact on nearby roadway conditions or pedestrian facilities." Exhibit 68, Attachment 5.

Technical Staff reports the proposed special exception complies with the Environmental Overlay Zone provisions as follows, Exhibit 65 (a):

The property is exempt from the requirements of submitting a Forest Conservation Plan because it qualifies as a modification to an existing developed property (Natural Resource Inventory/Forest Stand Delineation #4200917E). The proposed development does not:

1. Remove more than 5000 square feet of forest;
2. Does not affect any forest in a stream buffer; and
3. Does not require a subdivision Plan.

Technical Staff also advised the proposed special exception conforms with Environmental Overlay Zone provisions for imperviousness as follows, Exhibit 65 (a):

Impervious surface restrictions for development projects in the Upper Paint Branch SPA are set forth in Section 59-C-18.152 of the Environmental Overlay Zone [which] has an 8% imperviousness limit for new projects. The existing site has 55,280 square feet of existing impervious surfaces, or about 34.1%. This includes the existing pools, bath house and pool pad, tennis courts, basketball court, picnic area, parking area and sidewalks.

The project will add an additional 135 square feet of impervious surface for construction of the proposed cell tower compound. However, 706 square feet of imperviousness will be removed to compensate for the additional amount. The applicant is proposing to remove the concrete and restore the soil subsurface of an existing picnic area. The resulting impervious area on the property is 54,709 square feet, or about 33.8%. While the proposed project still has an impervious level that exceeds the 8% required under Section 59-C-18.152 of the Environmental Overlay Zone, under Section 59-C-18.152 (a)(1) the Environmental Overlay Zone allows for existing impervious surfaces that exceed the 8 percent limit to remain or be reconstructed. The proposed project will actually reduce the impervious area by 571 square feet, or about 0.3%. Therefore, the project conforms to the Environmental Overlay Zone for imperviousness.

The Planning Board approved the SPA Water Quality Plan on September 15, 2011, with conditions. Exhibit 52 (b).

1. Setback Waivers

Petitioner is requesting nine (9) setback waivers: a 17-foot reduction of the 1:1 [one foot for every foot of height of the cell tower] from the southern (front) property line as required by § 59-G-2.58 (a) (1) (A) and eight reductions of required 300-foot setback from the nearest off-site dwelling as set forth in §59-G-2.58 (a) (2) (A).

a. Waiver of Setbacks from the Property Lines:

Zoning Ordinance §59- G-2.58(a) (1) (A) requires that a support structure, in agricultural and residential zones, *must* be set back a distance of one foot from the property line for every foot of height of the structure. In this case, the minimum required setback is 125 feet. As shown on the chart below, the property line setback is easily met on three sides: it is 125.9 feet from the western property line; 507.9 feet from the northern property line; and 141.6 feet from the eastern property line. However, the minimum property line setback will not be met for the south property line because the proposed structure is only 109.4 from the property line. The following chart shows the proposed and required minimum property line setback, (Exhibit 17 (c), map Z-1):

PROPOSED FLAGPOLE SETBACKS		
	PROPOSED	MIN. REQUIRED
FRONT YARD (SOUTH)	109.4'	125'
REAR YARD (NORTH)	507.9'	125'
SIDE YARD (WEST)	125.9'	125'
SIDE YARD (EAST)	141.6'	125'
CLOSEST ROAD	136.6'	N/A

Petitioners are seeking a reduction of the setback requirements, pursuant to §59- G-2.58(a)(1)(D), to allow the cell tower to be erected 109.4 feet from the southern property line instead of the required 125 feet. Although the 125-foot setback could be met by moving the structure north on the property, Petitioners contend that it will be less visible at the proposed site. As explained by Petitioner, “[p]lacing the flagpole just outside the tennis courts enables it to be screened by existing mature vegetation at the front and sides of the property.” Exhibit 17 (a), page 6.

The Board of Appeals is authorized by Zoning Ordinance §59- G-2.58(a) (1) (D) to reduce the

setback requirement to not less than the building setback¹¹ of the applicable zone *if* the applicant request a reduction and “evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby properties, if any, and visibility from the street.”

Technical Staff did not support this setback reduction based on the following rationale:

The site has a rather steep topography from Fairland Road and many mature trees are located along the perimeter of this property. As discussed in the Standards for Evaluation section, the number of requested waivers has been identified as a non-inherent adverse effect, showing that this site is not large enough to handle the required setbacks. When evaluated alone, this reduction request would likely be supported because the topography and tree line (with additional evergreen plantings) would effectively reduce the visual impact from the street. However, since eight other reductions to the dwelling setbacks are requested, staff has concluded that this tower cannot be located on this property in a way that it will be less visually obtrusive to the nearby residential properties.” Exhibit 68, p. 9.

The Hearing Examiner concurs with Technical Staff that the topography and existing vegetation along Fairland Road and the additional evergreen plantings shown on the site plan “would effectively reduce the visual impact from the street.” (Emphasis added.) The various photographs provided by Staff (Exhibit 68), Petitioner (balloon fly test from Mimosa Lane) (Exhibit 11 (d)), and Mr. Hagler (Exhibit 72) supports this conclusion. Given the height of the trees (approximately 70 feet), the visual impact from the street would be minimal and most likely only include the top half of the cell tower over the tops of the trees.

The Hearing Examiner finds that the Petitioner did not present sufficient evidence, however, to show that the proposed facility is in a “less visually obtrusive” location than if it had been sited to comply with the 125-foot property line in the open area north of the basketball court.

This area (north of basketball court), as shown in the photographs and on the site plan, is adjacent to the parking lot and appears to be at the same ground elevation (390 feet) as the proposed

¹¹ The minimum front yard building setback in the R-200 zone is 40 feet. Thus, the proposed 109.4 setback easily meets that minimum.

site. There is a group of pines (identified as “tree group 3” on the SPA Water Quality Plan, Exhibit 17(c), map Z-7) along the parking lot in this area. The proposed 8-foot fence and additional evergreen plantings on three sides would certainly offer the same screening from the street in this area as it would in the proposed location. Thus, it is arguable that at this location the visibility from the street would be even less than at the proposed location. Therefore, the proposed location, considering the visibility from the street, is not necessarily “less visually obtrusive” than if sited to meet the 125-foot setback.

Since the property is located in a dense residential neighborhood, the visual impact of the proposed tower to the adjoining and nearby neighbors must also be considered. Thus, the question becomes whether the proposed location is less visually obtrusive considering the adjoining and nearby properties?

The Hearing Examiner agrees with Technical Staff’s conclusion that “the site is extremely narrow and does not offer appropriate buffers from the east to west property line in order to visually reduce the bulk or scale of this tower especially due to proximity to some of the adjoining houses where the greatest setbacks are requested.” Exhibit 68, p.3. According to Technical Staff, “[t]he existing trees near the east and west property boundary consist primarily of tulip poplar, ash and oak trees [and] while these trees provide a buffer during the late spring and summer months, they are deciduous trees that have no leaves in the fall and winter months thereby increasing the visibility.” Exhibit 68, p.3. The aerial photographs shown on pages 6 and 7 of the report clearly illustrate this point.

The Hearing Examiner also concurs with Technical Staff “that this tower cannot be located on this property in a way that it will be less visually obtrusive to the nearby residential properties.” Exhibit 68, p. 9. Therefore, the Hearing Examiner would recommend that the Board deny Petitioner’s request to reduce the setback requirements pursuant to §59- G-2.58(a)(1)(D), to allow the

cell tower to be erected 109.4 feet from the southern property line instead of the required 125 feet.

Nor does the evidence reveal that the particular location was chosen in order to mitigate the facility's visual impact. Petitioner's civil engineer, Mr. Shabshab, clearly testified that he did not consider other locations on the property at the owner's direction: the owner wanted the cell tower to be located at the lowest point on the property between the tennis courts and the existing wooded area fronting Fairland Road. Thus, the proposed facility and equipment compound was designed in the shape of an "L" in order to take advantage of the mature trees, estimated to be 70 feet tall, on Fairland Road. Also, the disturbance at this location would be minimal and would not require the removal of any trees. Mr. Shabshab testified that while the a higher ground elevation on a property is generally the preferred location for a cell tower, "everyone involved in the project thought that this would be the best area to actually accomplish all the coverage objectives, accomplish all the objectives of the property, meaning that it's . . . the least visible spot on the property and it's least destructive to the . . . owners." Tr. 121. He stated that given the existing facilities on the property the 1:1 setback could not be met at a location "that was acceptable to the property owners." Tr.122. However, he agreed that the setback could be met if the tower was moved to the area between the basketball court and bathhouse. Mr. Shabshab testified that he believed the cell tower would be "more visible" at this location than if it were sited in its proposed location because this is more open and did not include the same type of ground and tree cover as along Fairland Road. Tr.131-133.

b. Waiver of Minimum Setbacks from Dwellings:

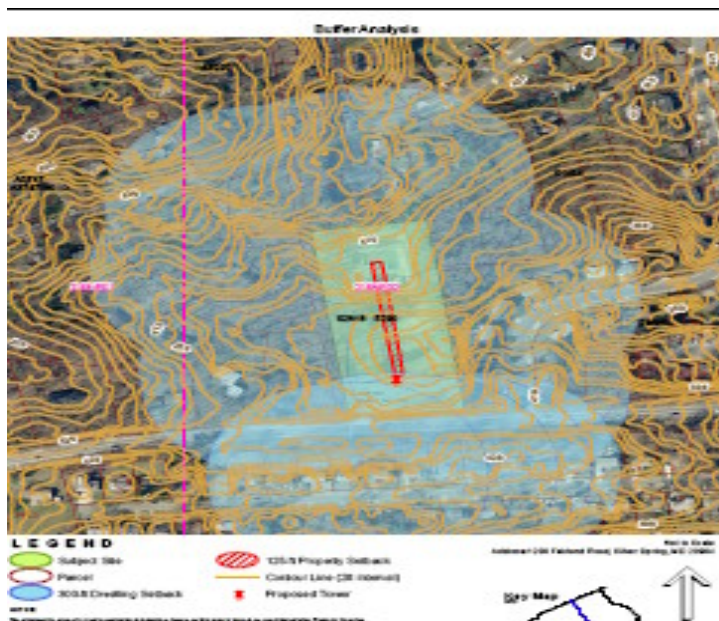
In addition to meeting the required setbacks from the property lines, Zoning Ordinance §59-G-2.58 (a) (2) (A) requires that the proposed structure, in agricultural and residential zones, *must* be set back 300 feet from the nearest off-site dwelling. The distance is measured from the base of the structure to the corner of the off-site dwelling.

As shown on the site plan map which can be found on page 14 of this report, there are twelve properties within the 300-foot off-site dwelling radius, eight of which require a reduction in the setback as shown¹² below:

FLAGPOLE SETBACKS FROM DWELLINGS			
LOT	PROPOSED	REQUIRED	REDUCTION
1	185'	300'	115'
2	185'	300'	115'
3	228'	300'	72'
4	289'	300'	11'
11	224'	300'	76'
12	322'	300'	N/A
13	275'	300'	25'
14	294'	300'	6'
15	297'	300'	3'

In an effort to see if the number of waiver requests could be reduced, Technical Staff did a buffer analysis, as depicted below, (Exhibit 68, Attachment 8) and concluded that “there is no instance on the site where the applicant could meet the 300-foot dwelling setback without requesting reductions of the required minimum setbacks,” and noted, “[t]he farther back from the road (north) the tower would move, the higher in topography and the closer the tower would move to Lots 3 and 4.” Exhibit 68, p. 5.

¹² The lot numbers on the site plan and as shown in the flagpole setbacks chart reference the list of adjacent and confronting property owners which appear on the next page, Z-2, of the site plan. Petitioner revised the Statement of Justification, page 6, to reflect the lot numbers on the official zoning map.



Petitioner’s civil engineer confirmed Technical Staff’s finding that there was no place on the property where the cell tower could be moved to meet the 300-foot off-site dwelling requirement because the “property does not get any wider.” Tr. 130. He testified that moving the cell tower to the middle of the property (open area) may alleviate the setback issue for dwellings on the south; the adjacent properties (east and west) will remain within the 300-foot setback radius. By moving north on the property the 300-foot radius would affect other dwellings in the rear which are not shown on the site plan. Tr. 132. Thus, concluding that there is no location on the property where the cell tower would meet the 300-foot setback requirement.

The Board of Appeals is authorized by Zoning Ordinance §59- G-2.58(a) (1) (D) to reduce the setback requirement to a distance of one foot from an off-site residential building for every foot of height of the support structure (*i.e.*, 125 feet in this case) if the applicant requests a reduction and “evidence indicates that a support structure can be located in a less visually obtrusive location after

considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.”

The Hearing Examiner finds that Petitioner has not satisfied the standards for a waiver of the minimum setback from nearby dwelling.

Section 59-G-1.21 of the Zoning Ordinance states in pertinent part that “a special exception may be granted when the Board or the Hearing Examiner finds from a preponderance of the evidence that the proposed use . . . *complies* with the standard and requirements set forth for the use in Division 59-G-2.” [Emphasis added.] Consistent with the use of the term “complies,” Section 59-G-2.58(a) provides for the standard and requirements which “any telecommunication facility *must* satisfy.” Further, Section 59-G-(a) (2) (A) states the “[a] support structure *must* be set back from any off-site dwelling . . . [i]n agricultural and residential zones a distance of 300 feet.”

Owing to the mandatory nature of the aforementioned language, one could argue that before a waiver request can be considered, a Petitioner must show that the setback requirements can be met *somewhere* on the property in order to satisfy the minimum setback requirement. In this connection, it is noted that the waiver provision in Section 59-G-(a) (2) (D) (ii) provides: “that a support structure can be located in a less visually obtrusive location” if approved by the Board (emphasis added). One could read the term “less” to imply a requirement that a setback could be met elsewhere on the property but that such a location would be more visibly obtrusive.

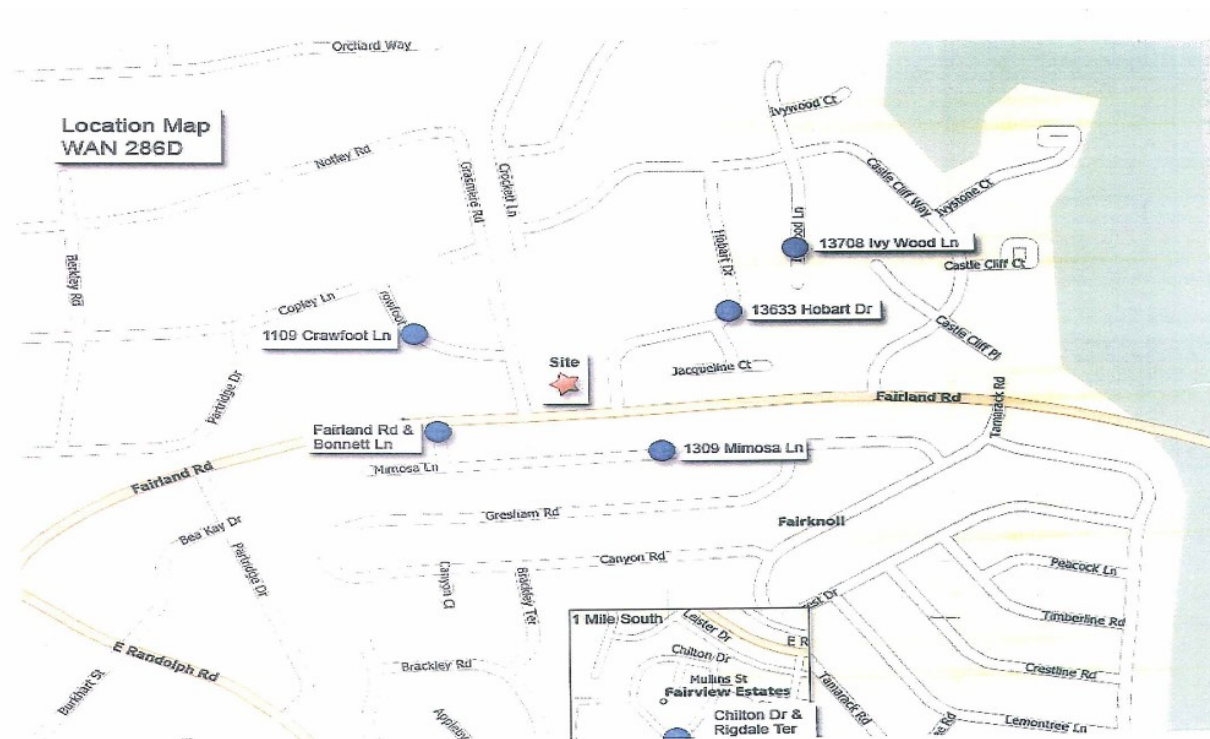
However, the legislative history of this provision does not make it clear that that was the Council’s intent in framing this provision of the Zoning Ordinance, and neither the Hearing Examiner nor the Board of Appeals need reach this issue in order to decide this case. This application is so extreme in the number and size of its setback waiver requests that granting the numerous waivers requested by Petitioners would clearly defeat the underlying intent behind the statutory setback scheme.

Petitioners here are asking for eight waivers of the 300 foot setback requirement. Two of those waivers would allow reductions of the setback by 115 feet (from Lots 1 and 2), and other waivers would allow setback reductions of 72 feet (from Lot 3), 11 feet (from Lot 4), 76 feet (from Lot 11), 25 feet (from Lot 13), 6 feet (from Lot 14) and 3 feet (from Lot 15). What Petitioners are essentially asking is that they be allowed to place the support structure in a location without regard to the dictates of the Zoning Ordinance and as if there was no requirement of a 300-foot setback. Because granting Petitioners extreme waiver requests would eviscerate the protections for neighboring properties intended by the statutory setback, the Hearing Examiner recommends that Petitioners' eight (8) requests for a reduction in the 300 foot setback be denied.

C. Impact of the Proposed Facility on the Neighborhood

The most significant issue regarding a telecommunications facility in a residential zone is its potential visual impact upon the neighbors.

Mr. Severson testified that when T-Mobile erects a new cell tower, it does a visual "balloon fly" test, using a red balloon (about six feet in diameter) raised to the height of the proposed cell tower. T-Mobile then simulates what the actual cell tower would look like based on the 125-foot height and designed as a flagpole. Visibility was examined at various points around the site, and photographs of the site were taken from these points, at the locations designated on the following location map, shown on the next page (Exhibit 11). Tr. 41-47.



The tag, WAN-286D, pertains to this particular transmission tower. The red star in the center shows the location of the proposed cell tower based on its coordinates. The various blue dots show the points of the location where the photographer stood to take the pictures. The address for each location is noted in a text box next to each blue dot. The photographs and photo simulations, as shown on the next page, identify the location, distance from the proposed site and visibility of the balloon from that location.



Twin Farms view from north towards Fairland Road – balloon fly



13633 Hobart Drive –view from north east (.16 miles from site)- balloon fly



13633 Hobart Drive –view from north east (.16 miles from site) Flag simulation



Fairland and Bonnett –
view from south west
(.09 miles from site)



1109 Crowfoot
Lane/view from north
east (.15 miles from
site)



Chilton Dr. & Rigdale
Terr./ view from
south (1 mile from
site)



13708 Ivy Woods Ln./
view from north east
(.26 miles from site)-
balloon fly



13708 Ivy Woods Ln./
view from north east
(.26 miles from site)
Flag simulation

Mr. Severson testified that the balloon was visible from 13633 Hobart Drive (Exhibits 11 (e) and (f) and barely visible from 13740 Ivy Wood Lane (Exhibits (h) and (i)). The balloon was not visible from the other four (4) locations. Exhibit 11(g). Tr. 41, 50.

Technical Staff made the following comments in response to the 30 letters of support for the proposed cell tower, Exhibit 68, p. 4:

Most of the letters cited that the flagpole will blend into the surrounding neighborhood, and based on their specific locations, staff agrees that from most of the supporter's "view" there will be minimal impact of the proposed pole. The majority of supporters are not within the 300-foot dwelling setbacks, nor within the staff-defined neighborhood (78%). Approximately five of those letters of support came from residents within the neighborhood who would not see the flag pole from their vantage due to the topography and vegetation. These areas are not staff's concern. Staff is concerned about neighbors whose properties abut or confront the subject site, as two-thirds of the adjoining properties will require a setback reduction for this proposal, and these are the neighbors who will be greatly impacted by the height and visual bulk of the proposed tower.

The Petitioners claim that the flagpole will be consistent with the character of the neighborhood. However, the Hearing Examiner finds that the type of flagpole one typically finds in a residential neighborhood is compatible in size and height with the structures on the property. While most of the residents will likely only see the top half of the pole, the flagpole design does not blend into the wooded surroundings, and in fact the Hearing Examiner finds that it makes the cell tower more visible and out of place.

The Hearing Examiner agrees with Technical Staff that the “site is extremely narrow and does not offer appropriate buffers from the east to west property line in order to visually reduce the bulk or scale of this tower and the support structure especially due to the proximity to some of the adjoining houses where the greatest setbacks are requested.” Exhibit 68, p. 3. This point is clearly illustrated by comparing the aerial photographs of the property found on pages 6 and 7 of this report.

Finally, T-Mobile asserts in its Statement in Support of this application (Exhibit 17 (a), p.1), that “T-Mobile holds a license issued to it by the Federal Communications Commission (“FCC”) to provide personal communication service (“PCS”) throughout the greater Baltimore-Washington, DC metropolitan areas, including all portions and sections of Montgomery County, MD.” Petitioners’ radio frequency (RF) expert, Curtis Jews, testified that if this site is approved, T-Mobile commits to complying with FCC rules and its license regarding radio frequency emissions. Tr. 57.

The FCC regulates radio frequency exposure issues on a Federal level, and local officials are prohibited from deciding, based on health concerns, that a facility is inappropriate, as long as it complies with FCC regulations. Section 704(B) of the Telecommunications Act of 1996, 47 USC §332(c) (7) (B) (IV), provides, *inter alia*, that

No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [Federal Communications] Commission's regulations concerning such emissions.

D. The Master Plan

Petitioners' property is located within the boundaries of the 1997 White Oak Master Plan. Technical Staff reported that while the Plan "does not contain any specific recommendations for this property or for the surrounding neighborhood [the] overall objective of the Plan is to 'ensure livable communities for the future by protecting and strengthening their positive attributes and encouraging development that will enhance the communities.'" Exhibit 68, p. 3. With regard to special exceptions, the Plan seeks to avoid an excessive concentration of special exceptions along major transportation corridors like New Hampshire Avenue, Randolph Road and Powder Mill Road. (Exhibit 5 p. 24).

The Master Plan provides the following guidance for evaluating "new requests for special exception uses and their impact on the character and nature of the residential neighborhoods in which they are proposed" as follows:

Recommendations:

- *Require new requests for special exception uses . . . in residential communities to be compatible with their surroundings. Front yard set-back should be maintained;*
- *Avoid front yard parking because of its commercial appearance. Side and rear parking should be screened from view of surrounding neighborhoods.*
- *Require new buildings or any modification or additions to existing buildings to be compatible with the character and scale of the adjoining neighborhood.*
- *Avoid placing large impervious areas in the Paint Branch watershed due to its environmental sensitivity.*

Technical Staff made the following observations and conclusions about the subject petition, with regard to the Master Plan (Exhibit 68, p. 4):

Staff has concluded that the proposed use will conflict with the recommendations of the White Oak Master Plan. Although no parking is proposed, and existing parking used by the swim club is located along the side of the property, staff believes that the proposed use will not be compatible within the neighborhood.

The site is extremely narrow and does not offer appropriate buffers from the east to west property line in order to visually reduce the bulk or scale of this tower and the support structure, especially due to proximity to some of the adjoining houses where the greatest setback reductions are requested. The existing trees near the east and west property boundary consists primarily of tulip poplar, ash and oak trees. While these trees provide a buffer during the late spring and summer months, they are deciduous trees that have little or no leaves in the fall and winter months, thereby increasing the visibility.

The Hearing Examiner agrees that while telecommunication facilities are a permitted use by special exception in the R-200 Zone, the proposed special exception use at this particular location is not compatible with the residential neighborhood. The area is densely residential and the site is too narrow to comply with any of the off-site dwelling setbacks, thereby increasing the visual impact of the structure on the adjoining properties. Based on this record, the Hearing Examiner concurs with Technical Staff that the planned use at this location is inconsistent with the goals and objectives of the *White Oak Master Plan*.

E. Need for the Proposed Facility

T-Mobile is proposing to locate a new telecommunications facility in order to fulfill its service requirements in this area. The TFCG initially reviewed the application in 2008 and recommended denial because the location of the monopole did not meet the zoning requirement that the monopole be at least 300 feet from any off-site dwelling. The TFCG reviewed the application again on May 4, 2011, and determined that the applicants have a justified need for a new site at the proposed 125 feet and that there are not any existing structures in the vicinity that would meet T-Mobile's service needs for the area. Exhibit 77 (a).

Even though this petition has been recommended by TFCG, the Board of Appeals "must make a separate, independent finding as to need and location of the facility." Zoning Ordinance

§59-G-2.58 (a) (12).

Petitioners presented evidence at the hearing as to both the need for, and the location of, the proposed telecommunications facility. For the reasons discussed below, the Hearing Examiner finds that Petitioner presented sufficient evidence as to need but not as to location.

Curtis Jews testified as an expert in Radio Frequency (RF) Engineering and network design for T-Mobile. Mr. Jews is the RF lead engineer for T-Mobile. Mr. Jews testified that the subject site is needed for a cell tower because customer complaints about inadequate in-home coverage and dropped calls. Mr. Jews testified the Twin Farms site is needed for construction of a new facility¹³ to improve current cell coverage in the surrounding area.

The search ring¹⁴ in this case was released primarily because of a lack of coverage in the area even though there is a high call volume for this area. Tr. 78. T-Mobile's coverage goal in this area is to provide improved in-building coverage and to provide coverage that will allow customers to have a call that is not interrupted by a dropped call and to improve the ability of residents to make 9-1-1 calls. Mr. Jews testified that based on the customer complaints and network statistics, gathered from nearby existing T-Mobile facilities as shown on the coverage maps depicted below, the call failure rate (dropped calls and 911 calls) in this area is between 4 and 5 percent, which exceeds T-Mobile's threshold of keeping the call failure rate under two percent. Tr. 91-92.

Mr. Jews introduced two coverage maps:¹⁵ Exhibit 10 (a), showing existing on-air coverage around the Twin Farms site; and Exhibit 10 (b), showing existing on-air coverage with the proposed cell tower (7WAN286D) activated at 125 feet. On the maps, green is in-building coverage, which is the coverage that one can expect inside of the home; blue is in-vehicle coverage; and yellow is the

¹³ Mr. Jews concurred with Mr. Severson's testimony regarding the lack of suitable co-location opportunities or existing facilities within the search ring to meet the coverage objectives for this area. Tr. 95.

¹⁴ Mr. Jews testified that the proposed site is in the center of the search ring.

¹⁵ Mr. Jews testified that the coverage maps were submitted to the Tower Committee. Tr. 86.

on-street coverage. Mr. Jews testified that Exhibit 10 (a), depicted below, shows that while the in-vehicle coverage was good, the in-building coverage was poor and did not provide T-Mobile's customers with reliable cell, data and voice coverage.

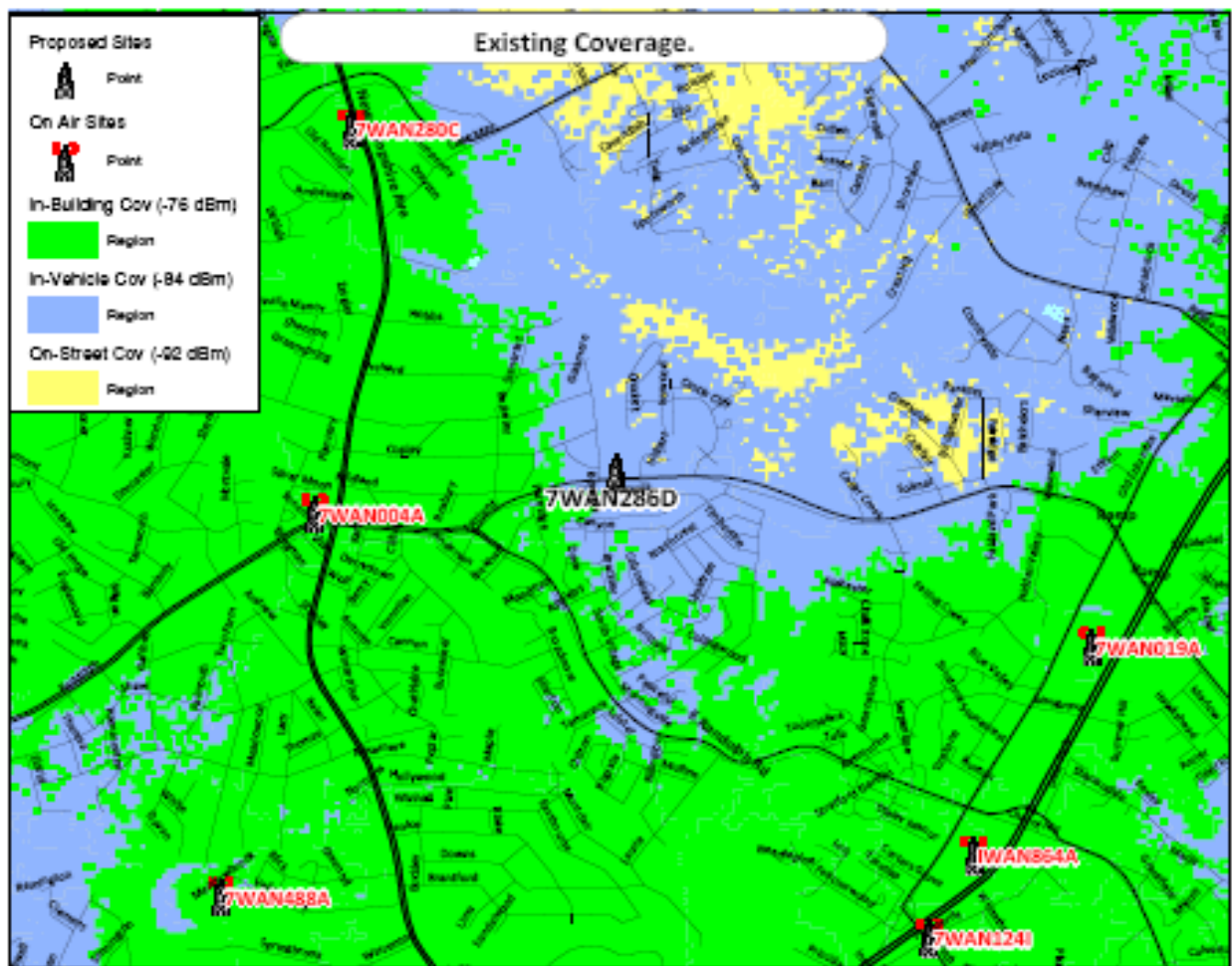
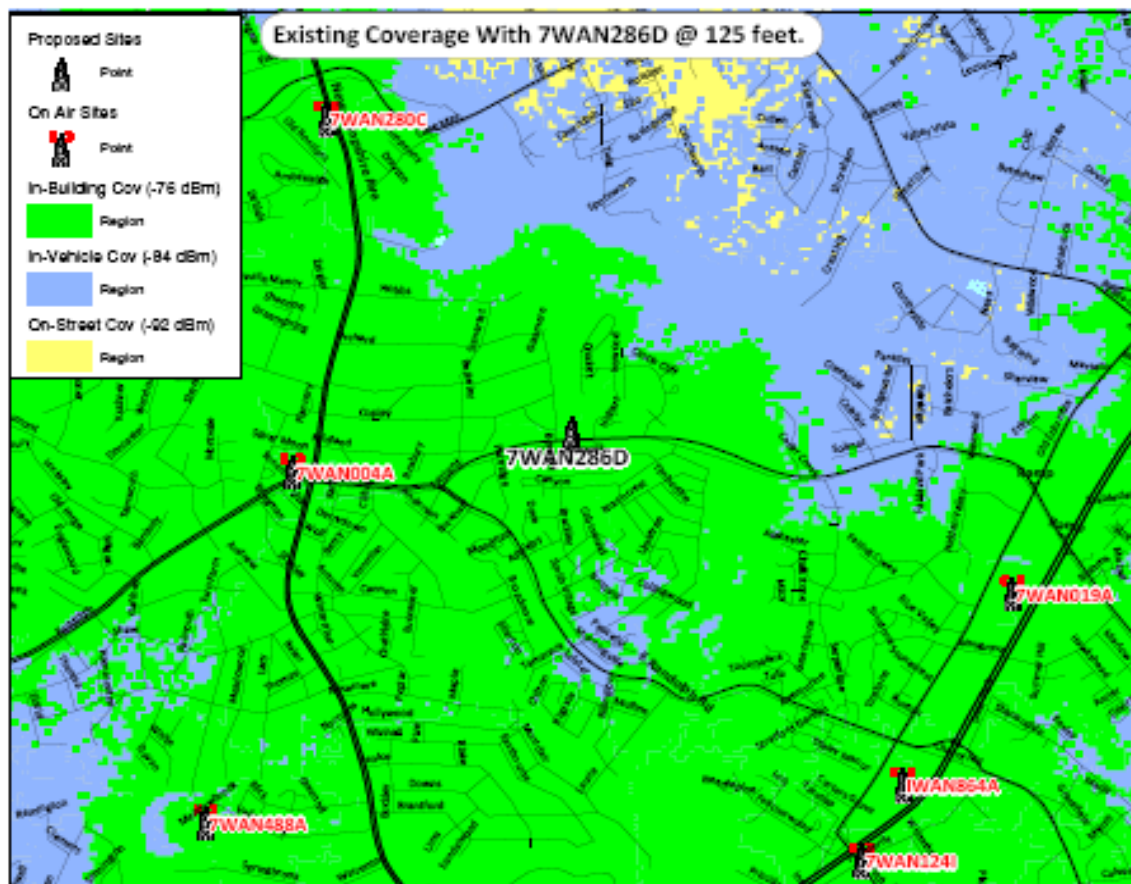


Exhibit 10 (b) depicted below shows the expected coverage with 7WAN286D on air:



Mr. Jews testified that “with 7WAN286D at 125 feet [] there’s a significant improvement where there was predominantly blue [in-vehicle] and spots of yellow [on-street] have now become predominantly green [in-building] and blue.” Tr. 83. As shown, the expanded green area around the proposed cell tower demonstrates the improvement for in-building coverage. Mr. Jews stated the coverage maps are intended to show the cell, data and voice data usage by their residential customers in this area with and without the new facility. Tr. 96-97.

Mr. Jews testified that in order for T-Mobile to meet its coverage objectives in this area the minimum height for the proposed cell tower is 125 feet tall. The height of the pole was based on the topography and tall trees on the Twin Farms property and in the surrounding neighborhood. Tr. 93-

94 Thus, he concluded that the height of the proposed tower cannot be below 125feet’.

Mr. Jews testified that T-Mobiles radio frequency will not interfere with any other carrier and/or public safety systems in the area because T-Mobile was given an FCC license with their own band width. He also confirmed that the proposed site will be in compliance with applicable federal laws and regulations as shown in the Site Compliance Report on RF emissions. Exhibit 64(j).

The Tower Committee’s 2008 meeting minutes reflect that Petitioners attempted to but were unsuccessful in finding suitable existing structures in the vicinity to which T-Mobile could attach antenna’s to meet their coverage objectives and service needs for improved in-building coverage in the area. The Tower Coordinator reported to the Tower Committee that T-Mobile considered co-location at a nearby elementary school and a PEPCO utility pole which is summarized as follows, (Exhibit 77 (a):

This site was in lieu of two other locations T-Mobile had proposed to place antennas. The location at Fairland Elementary School had been denied by the Board of Appeals, and the PEPCO pole attachment would have required a County Telecommunications Franchise to place facilities in the public right-of-way, which T-Mobile does not intend to pursue.

According to T-Mobile’s site acquisition and zoning manager, Justin Severson, T-Mobile also evaluated and rejected a possible location of its antennas on a church steeple (Forcey Memorial Church located at 2130 East Randolph Road). This location was ruled out because the steeple was not tall enough (35 feet) and the location was too far east to meet T-Mobile’s coverage needs. Tr. 31

Mr. Severson testified that none of the “on air sites” as shown on the propagation maps (noted in red in Exhibits 10(a)-(c))¹⁶ were suitable co-location opportunities because the sites were not close enough to the Twin Farms site or suitable to meet T-Mobiles coverage needs. Tr. 30-31.

There is no evidence in the record to contradict the testimony of Mr. Jews and Mr. Severson that there is a need for a new telecommunications facility to improve cell coverage in the

¹⁶ Mr. Severson testified that this exhibit was submitted to the TFCG. Tr. 30.

neighborhoods between Route 29 Columbia Pike and Route 650 New Hampshire. Based on their testimony as it relates to need only and on the recommendation of the Transmission Facilities Coordinating Group, the Hearing Examiner finds that there is a need for a new telecommunications facility in this region.

However, despite a demonstrated need for improved coverage in this area, the Hearing Examiner finds that the Twin Farms property is not the appropriate location for a new cell tower. The Hearing Examiner concurs with Technical Staff's finds that the Twin Farms property is simply too small for the proposed use as evidenced by the Petitioners' need to request nine (9) reductions in the setback requirements. Based on the record of evidence and for the reasons previously stated, the Hearing Examiner finds that Twin Farms property is not the appropriate location for the proposed cell tower.

III. SUMMARY OF HEARING

At the hearing, Petitioners called three witnesses, Justin Severson,¹⁷ a zoning manager in charge of site acquisition for T-Mobile; Curtis Jews, a radio frequency engineer, and Camille Shabshab, the civil engineer who helped design the plans for the site.

Five individuals testified in support of the Petition as follows: The Chair of the Twin Farms Board of Directors, Jay Hagler, and four neighborhood residents and swim club members, Nick Lemberos, Michael Badrian, John Maloney and Janice Hylton. No one appeared in opposition to the Petition.

1. Justin Severson (Tr. 17-72):

Justin Severson testified that he has been employed by Network Building Consultants (NBC) as a zoning manager, primarily in site acquisition of telecommunication facilities for T-Mobile and

¹⁷ Mr. Donohue stated that Mr. Severson was sitting in for Ms. Hillorie Morrison, project zoning manager and agent for T-Mobile. He explained that while Ms. Morrison did most of the leg-work for this project, Mr. Severson worked with Ms. Morrison and was familiar with the project. Tr. 16.

was familiar with the proposed site and plans. Tr. 18. Mr. Severson has previous experience as a zoning and land use attorney and has been working with NBC since April 2011. Mr. Severson estimates that he is currently working on 115 site acquisition applications. Forty to fifty of the sites are in Montgomery County and in the zoning and tower approval stages. He has attended and participated in numerous meetings with the Department of Planning Staff, board members on TFCG and the community. Tr. 23-26. Mr. Severson was qualified as an expert in zoning and site acquisition.

Mr. Severson testified that none of the “on air sites” as shown on the propagation maps (noted in red in Exhibits 10(a)-(c))¹⁸ were suitable co-location opportunities because the sites were not close enough to the Twin Farms site or suitable to meet T-Mobiles coverage needs. Tr. 30-31. T-Mobile also evaluated and eliminated three (3) existing facilities as possible co-locations: William Tyler Elementary School,¹⁹ Forcey Memorial Church²⁰ and a wooden Pepco utility pole.²¹ Tr. 32-33. As a result, T-Mobile looked for and identified the Twin Farms property as an appropriate site to construct a new cell tower structure to meet its coverage and capacity needs.

In selecting a site for new construction, T-Mobile considers existing landscaping which provides screening of the proposed structure, whether the size of the parcel is large enough to meet the setback requirements, and whether the underlying use is compatible with the proposed new structure. He testified that in his opinion, the size of the property, 3.7 acres, was large enough to install the new structure, despite the inability to meet all the setback requirements. Tr. 35-36. Mr. Severson stated that “the other characteristics of this property made it the best solution.” Tr. 66-67.

¹⁸ Mr. Severson testified that this exhibit was submitted to the TFCG. Tr. 30.

¹⁹ This site was eliminated because of a school board policy against locating telecommunication facilities on elementary school property. Tr. 69

²⁰ This site was evaluated and eliminated as a possible co-location opportunity in 2008 because of height limitations (steeple was only 35’ tall) and the church was not close enough to the Twin Farms site to meet T-Mobiles coverage needs. Tr. 31.

²¹ In addition to unresolved leasing issues with Pepco, T-Mobile would have had to replace the wooden utility pole with a larger steel pole capable of supporting the antennas. Tr. 32-34.

Specifically, Mr. Severson testified that the proposed location for the new structure (between the tennis courts and Fairland Road) and elevation of the proposed site (lowest area of the property), along with the fact that the property is heavily wooded with mature trees on all sides, minimizes the visual impact on the adjacent residential neighborhood. As proposed, the equipment compound will be screened with an eight (8) foot wood fence. The proposed tower and equipment compound²² will be further screened with additional landscaping of the west, north and east side. The flagpole design conceals the antennas and coaxial cables inside the pole and includes two antenna canisters for additional carriers. Mr. Severson also testified that the site complies with the county's co-location requirements and further noted that no expansion or modification to the compound or flagpole would be required once constructed. Tr. 63-64

Mr. Severson also submitted photographs of the balloon test²³ and photo simulations of the proposed tower to demonstrate the visual impact of the property from six (6) locations surrounding the property. The balloon test was conducted on July 26, 2011, in the morning (8 a.m. to 11 a.m.) for increased visibility.²⁴ He explained that a red balloon, estimated to be approximately 6 feet in diameter, was tethered to a cable the height (125') of the proposed tower. The photos were taken from different vantage points and distances which are noted on each photo to show the visibility of the balloon from those locations. Tr. 41-47

Mr. Severson testified that the balloon was visible from 13633 Hobart Drive (Exhibits 11 (e) and (f) and barely visible from 13740 Ivy Wood Lane (Exhibits (h) and (i)). The balloon was not visible from the other four (4) locations. Exhibit 11(g). Tr. 41, 50

²² Mr. Severson testified that equipment will be on a raised steel platform which includes space for the equipment for two additional carriers.

²³ Mr. Severson stated that these photos are not submitted to the TFCG. Tr. 49.

²⁴ Mr. Severson testified that he was present for the balloon test on July 26, 2011, and the follow-up community meeting on August 4, 2011. Tr. 37, 45 and 52.

2. Curtis Jews (Tr. 51-58):

Curtis Jews testified as an expert in Radio Frequency (RF) Engineering and network design for T-Mobile. Mr. Jews is the RF lead engineer for T-Mobile. Mr. Jews testified that he identifies areas that are providing less than desirable or unreliable cell coverage based on customer complaints and/or network statistics. Network statistics include the number of dropped calls, blocked calls,²⁵ and the probability of customers being able to make 9-1-1 calls. Tr. 76-78 and 88.

In this case, Mr. Jews testified that based on customer complaints and network statistics the area around the Twin Farms site was identified as providing less than desirable coverage for the customers in the area. Tr. 75. This area also has a high call volume because it is densely residential. Once he identifies an area that needs improved coverage he releases a search ring, which can have a quarter of a mile to half a mile radius, to the site acquisition agents to find suitable properties (co-location, existing or for new construction) that meet T-Mobile coverage objectives. Tr. 76.

Mr. Jews testified the Twin Farms site is needed for construction of a new facility²⁶ to improve current cell coverage in the surrounding area. The search ring in this case was released primarily because of a lack of coverage in the area even though there is a high call volume for this area. Tr. 78 T-Mobile's coverage goal in this area is to provide improved in-building coverage and to provide coverage that will allow customers to have a call that is not interrupted by a dropped call and to improve the ability of residents to make 9-1-1 calls. Mr. Jews testified that based on the customer complaints and network statistics the call failure rate (dropped calls and 911 calls) in this area is between 4 and 5 percent which exceeds T-Mobiles threshold of keeping the call failure rate

²⁵ Mr. Jews testified that dropped call issues (involuntary termination of a call) are due to a lack of cell coverage in the area. A blocked call, considered to be a capacity issue, is when a customer is unable to connect to the network in high call volume areas. Tr. 78

²⁶ Mr. Jews concurred with Mr. Severson's testimony regarding the lack of suitable co-location opportunities or existing facilities within the search ring to meet the coverage objectives for this area. Tr. 95.

under two percent. Tr. 91-92

Mr. Jews introduced two coverage maps:²⁷ Exhibit 10 (a), showing existing on-air coverage around the Twin Farms site; and Exhibit 10 (b), showing existing on-air coverage with the proposed cell tower (7WAN286D) activated at 125 feet. On the maps, green is in-building coverage, which is the coverage that one can expect inside of the home; blue is in-vehicle coverage; and yellow is the on-street coverage. Mr. Jews testified that Exhibit 10 (a) shows that while the in-vehicle coverage was good, the in-building coverage was poor and did not provide T-Mobiles customers with reliable cell, data and voice coverage.

Referring to Exhibit 10 (b), Mr. Jews stated: “with 7WAN286D at 125 feet . . . there’s a significant improvement where there was predominantly blue [in-vehicle] and spots of yellow [on-street] have now become predominantly green [in-building] and blue.” Tr. 83. Mr. Jews stated the coverage maps are intended to show the cell, data and voice data usage by their residential customers in this area with and without the new facility. Tr. 96-97. Mr. Jews testified that in order for T-Mobile to meet its coverage objectives in this area the minimum height for the proposed cell tower is 125 feet tall. The height of the pole was based on the topography and tall trees on the Twin Farms property and in the surrounding neighborhood. Tr. 93-94 Thus, he concluded that the height of the proposed tower cannot be below 125’.

Mr. Jews testified that T-Mobile’s radio frequency will not interfere with any other carrier and/or public safety systems in the area because T-Mobile was given an FCC license with their own band width. He also confirmed that the proposed site will be in compliance with applicable federal laws and regulations as shown in the Site Compliance Report on RF emissions. Exhibit 64 (j).

3. Camille Shabshab (Tr. 104-140):

Camille Shabshab, a civil engineer and surveying consultant to T-Mobile qualified as an

²⁷ Mr. Jews testified that the coverage maps were submitted to the Tower Committee. Tr. 86.

expert in civil engineering. His firm, Entrex Communication Services, prepared all the site plans submitted with the Petition. Tr. 107.

Mr. Shabshab described the Twin Farms property and Petitioner's proposal. He testified that the property is located in a residential neighborhood with varying lot sizes from 10,000 to 15,000 square feet. The Twin Farms property is rectangular and approximately 300 feet wide (east to west) and 600 feet deep (north to south). Access to the property is from the south off of Fairland Road which has a ground elevation of 410 feet. From Fairland Road the property has a steep slope to the lowest point on the property (ground elevation 390 feet) where the proposed facility and tennis courts are located. From that point, the grade in the property slopes upward toward the swimming pool which is located at the rear of the property. Tr. 105-110. Other uses on the property include a bath house, an open play area, a basketball court, picnic area and parking lot. The property has mature trees, estimated to be between 70 to 80 feet tall, on all sides of the property. Tr. 119-120.

Mr. Shabshab testified that the proposed facility compound was designed to occupy the space between the tennis courts and the existing wooded area, a large stand of trees just north of Fairland Road. He said the typical cell tower compound is square. However, the proposed compound was designed in the shape of an "L" in order to take advantage of the existing mature trees between Fairland Road and the tennis courts without having to remove any trees. Tr. 111, 138 and 140. The compound will be enclosed with an eight (8) foot board-on-board fence. Additional landscaping (30 evergreens) will be planted on the west, north and east sides to screen the fence. Tr. 138. There is no vehicular access to the entrance of the compound which is located about 20 feet from the existing parking lot. Technicians servicing the facility, no more than once a month, will be required to park in the parking lot and walk 20 feet to the compound. Tr. 112-113

Mr. Shabshab testified that a typical cell tower pole is 27 to 30 inches at the top and will

taper down to approximately four feet in diameter at the base. He indicated that the actual pole for this project has not yet been designed. Tr. 138. The compound will be approximately 1,900 square feet and will include a 10 x 20 raised steel grated platform on concrete pillars to support the related equipment cabinets for the proposed tower. The compound has sufficient ground space for two additional raised platforms to accommodate future carriers.

The raised steel platforms, which will be on concrete piers, were designed to comply with the impervious surface restrictions on the property because it is in a watershed (SPA). The concrete pillars will add about 135 square feet of impervious surface. To compensate for this increase, Petitioner has proposed to remove the picnic area located between the tennis courts and the existing parking lot which will reduce the impervious surface area by 570 square feet. The steel grated platform will allow water to pass through to the ground below which will not be compacted so it will return to its natural state. He confirmed that this information was reviewed and approved by the County. Tr. 113-119.

Mr. Shabshab testified that no other locations on the property were considered for the proposed facility and compound. He stated: “everybody involved in the project thought that this would be the best area to actually accomplish all the coverage objectives, accomplish all the objectives of the property, meaning that it’s . . . the least visible spot on the property and it’s the least destructive to the . . . owners.” He further explained that ideally they would have preferred to have located the proposed facility on the highest point of the property. The proposed location is lodged between the tennis courts and a tall stand of trees which screens the view of the pole from Fairland Road. Tr.121

Mr. Shabshab testified that the proposed facility meets the 1:1 setback from the property line on three sides of the property but not from Fairland Road (south). The required setback is 125’ and the proposed facility is 109’ from Fairland Road. He testified that considering the other

facilities (pool, basketball and tennis courts) on the property there were no locations that were acceptable to “all parties” and where the proposed facility could meet the 1:1 setback. Tr. 122. He stated that the basis for the 1:1 setback requirement is so that if the pole falls it will stay within the property lines. Mr. Shabshab testified that cell towers are designed not to fail and to have its weakest point in the middle of the pole so that it will fold or snap in half at that point and not at the base in the event of failure. Therefore, if the proposed cell tower failed, the structure would stay well within the property lines. Tr. 124-127.

Mr. Shabshab testified that because the Twin Farms property is narrow (approximately 300 feet wide from east to west) there is no place on the property where the proposed facility could meet the 300-foot setback requirement from adjacent dwellings. Tr. 123-124 and 130-131. He believed the purpose of the setback was for aesthetics and to minimize the visual impact of the proposed facility. He believes, without actually going onto adjacent properties, that the existing mature tree cover on both sides of the property screens the adjacent property owner’s line of sight of the proposed facility. Other mitigating factors include the stealth design of the pole (concealed antennas) and the fact that the entire compound will be fenced and screened with additional and existing landscaping. Tr. 112, 119 and 127-128.

Mr. Shabshab testified the he did not consider the open area south of the bathhouse, which has a higher elevation than the proposed site, because the property owners did not want the cell tower in that location. There would be greater visibility of the tower in the higher location because there are no trees other than on the perimeter of the property in that area. Tr. 133-134. He believes that considering the number of tall trees surrounding the property the cell tower will look like a tree trunk even in the winter time when the trees have lost their leaves.

4. Nick Lemberos :(Tr. 142-147)

Nick Lemberos testified in support of the Petition. Mr. Lemberos has resided at 13602

Colfair Drive, which is about 1 mile from the Twin Farms property, for the past 18 years. He has been a member of the pool for about 10 years and his oldest child works as a lifeguard. He testified that the cell, data and voice coverage in the area and his home is very poor. The poor coverage affects his (and his wife's) ability to work from home and receive emergency phone calls while inside the home. He said that during a recent family emergency he and his wife could only be reached on their land line because the emergency call did not go through on his wife's cell phone. In his opinion, he believes that the location of the proposed facility is ideal because the site is almost invisible from Fairland Road. Referring to Exhibit 10 (a), the existing coverage map, he indicated that his house is northeast of the property which shows in-vehicle (blue) and on-street (yellow) coverage.

5. Michael Badrian: (Tr. 147-151 and Exhibit 70)

Michael Badrian testified that he resides at 13640 Hobart Drive, lot # 2, which is adjacent to the Twin Farms property on the east side. He testified that he was aware of but could not attend the July 26, 2011, balloon test. However, he described his line of sight to the property from his backyard is viewed through the existing trees. While he believes he will not see the proposed tower through the trees, he stated that he might be able to see the top half of the flagpole. He also said he was okay with the flagpole design.

6. John Maloney: (Tr. 151-158)

John Maloney testified that he resides at 12527 Farnell Drive, which is a couple of miles away from Randolph Road on the other side of New Hampshire Avenue. He testified that he is a member of the swim club and is frequently in the area and has experienced dropped cell phone calls because of the poor coverage in the area. This has caused communication problems with his children who work at the swim club and are frequently in the neighborhood. In addition to dropped calls while traveling on Fairland Road, he has also experienced difficulty reaching his children

when he tries to call them from his work which is located Rockville. He believes the lack of cell coverage, consistently dropped calls and difficulty making 9-1-1 calls poses a grave safety concern for the people who work and live in this area.

Mr. Maloney testified that in his job as Deputy States Attorney for Montgomery County, he has found that T-Mobile has been a good corporate citizen working with his office on several cases by providing cell phone information on individuals involved in criminal activity. Mr. Maloney believes this helps to deter future criminal activity and helps keep the community safe.

Mr. Maloney testified that money from the proposed cell tower would be a tremendous help with the club's "dubious financial status." He said memberships are down and he is concerned about the future operation of the swim club as well as the safety of the neighborhood if the swim club cannot continue to operate. He also believes the lack of opposition from the neighbors is an indicator that there are no complaints about the aesthetics of the proposed facility in the neighborhood.

7. Janice Hylton: (Tr. 161-165 and Exhibit 23)

Janice Hylton testified that she resides at 1533 Ivystone Court, which is approximately a half a mile northeast of the swim club. Referring to Exhibit 10 (a), the existing coverage map, she indicated that her house is northeast of the property which shows in-vehicle (blue) and on-street (yellow) coverage. Ms. Hylton was present for the balloon test in July and testified that she could not see the balloon from her home or when she drove around the neighborhood (Ivystone Court to Castle Cliff to Hobart Lane), including in both directions on Fairland Road. She said that it was not until she was on the Twin Farms property that she could see the balloon if she looked up.

Ms. Hylton testified that the cell phone coverage in her neighborhood and in her home is poor. She has been a swim club member for approximately 18 years and all of her children have worked there. She has experienced problems making or receiving calls to and from her children

because of the lack of coverage at the swim club and in her neighborhood. She said calls are frequently dropped when she enters her neighborhood or while traveling on Fairland Road. Like Mr. Maloney, Ms. Hylton believes the lack of cell coverage is a safety issue for the neighborhood, especially with the many children walking to school or waiting for a school bus.

8. Jay Hagler: (Tr. 166-194 and Exhibit 45)

Jay Hagler testified on behalf of the Twin Farms Board of Directors. Exhibit 73. Mr. Hagler testified that he resides at 1325 Crockett Lane which is directly behind the pool (north side) and has been the board chair since 2007. Tr. 166. Referring to Exhibit 10 (a), the existing coverage map, he indicated that his house is north of the property which shows in-vehicle (blue) and on-street (yellow) coverage. Tr. 176. He keeps a land-line in his home for safety because the cell coverage in his home is so poor and unreliable. Tr. 187 Mr. Hagler concurred with the testimony of the other residents who testified in support of the petition.

Mr. Hagler testified that T-Mobile approached him in 2008 about the possibility of locating the proposed facility on the property. At that time, he notified the three closest neighbors, on the east side off of Hobart Drive (lots 1 and 2) and on the west side off of Crowfoot Lane (Lot 11), of T-Mobile's proposal. Mr. Hagler said he is very familiar with the plans and has been diligent in keeping the residents in the surrounding neighborhood and swim club members informed about the proposal since 2008. Most recently, he hand-delivered updated information on the proposal to the property owners located across Fairland Road on Mimosa Lane (Lots 15-17) to ensure they were fully aware of the proposal. Tr. 171, 187-188.

Mr. Hagler presented an aerial photograph of the Twin Farms property he downloaded from Google Earth a few days prior to the hearing and several photos he took of the proposed site from different vantage points on the swim club property. Exhibit 72. Photo 1 (a) and 3 (a) were taken July 26, 2011, the date of the balloon test, from two spots on the north side of the property: Photo 1

(a) was taken from the entrance to the clubhouse; and Photo 3 (a) was taken from behind the pool looking towards the clubhouse. Using the same photos, Mr. Hagler “superimposed a green vertical line to represent what the flagpole design tower will look like [from the north side of the property].” He said the flagpole was not drawn to scale but used as a visual tool. Tr. 181. Photo 2 was taken on September 28, 2011, to provide “a perspective of the area from the clubhouse entrance to Fairland Road.” Photo 4 was taken on the same day “to provide a perspective of the hill facing the clubhouse and cell tower location.” Exhibit 72. Tr. 171-182.

Mr. Hagler presented three additional photos intended to show the ground view of the swim club facing north towards Crockett Lane and from Crockett Lane facing south towards the swim club property. These photos were taken on September 29, 2011, in response to concerns raised in a letter (Exhibit 48) from a resident who lives on Crockett Lane and to show the existing tree buffer. Exhibit 74.

Mr. Hagler testified that the swim club has been in operation since 1958 by special exception which has been modified several times. In his opinion, the proposed facility will have no impact on the continued operation of the swim club because it will be in an area not used by the club which is also the lowest point on the property. The proposed location in his opinion is in the least visible area of the property. Thus, Mr. Hagler believes the proposed facility is consistent and compatible with the continued operation of the swim club. Tr. 193.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions,

and the Petitioners have the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioners have not satisfied all the requirements to obtain the special exception for a telecommunications facility on the Twin Farms property and has recommended denial.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition does not meet all the general and specific requirements for the proposed use.

A. Standard for Evaluation

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a telecommunications facility. Characteristics of the proposed telecommunications facility that are consistent with the “necessarily associated” characteristics of telecommunications facilities will be considered inherent adverse effects, while

those characteristics of the proposed use that are not necessarily associated with telecommunications facilities, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff listed the following inherent physical and operational characteristics necessarily associated with a telecommunications facility use (Exhibit 68, p. 5):

- (1) Antennas installed on or within a support structure with a significant height;
- (2) A technical equipment area that may or may not be enclosed within a fence;
- (3) Visual impacts associated with the height of the support structure;
- (4) Radio frequency emissions;
- (5) A very small number of vehicular trips per month for maintenance; and
- (6) Some form of back-up power.

The inherent effects of a typical monopole telecommunications facility would generally have only a visual impact on the neighborhood, since it would be noiseless, unmanned and require only occasional servicing. Technical Staff also found “that there are two non-inherent adverse impacts associated with the requests: site size and number of setback reduction requests.” Technical Staff’s explained their finding as follows, (Exhibit 68, p. 5):

Staff evaluated the tower request by analyzing the potential visual impacts based on the location, vegetation, topography and the nine requested setback reductions. While height and visual impact tend to be inherent adverse effects commonly associated with telecommunications facilities, when coupled with requested setback reductions, staff must consider whether these inherent characteristics associated with the telecommunications tower could create non-inherent adverse impacts. Staff has determined that the non-inherent adverse effects combined with the inherent adverse impacts is sufficient to warrant denial.

The Hearing Examiner would add one non-inherent impact- the location of the property in an SPA. However, the Hearing Examiner finds that special exception should not be denied on this ground because the design of the proposed facility and removal of the picnic area reduces the impervious surfaces existing on the property.

For all the reasons discussed in Part II of this report, and considering size, scale, scope, light,

noise, traffic and environment, the Hearing Examiner concludes, as did the Technical Staff, that there are two (2) non-inherent adverse effects from the proposed use which would require denial of the petition.

B. General Conditions

The general standards for a special exception are found in Zoning Code §59-G-1.21(a). As outlined below, the evidence of record demonstrates compliance with some, but not all of the general standards.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: A telecommunications facility is a permissible special exception in the R-200 Zone, pursuant to Code § 59-C-1.31 (b).

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use would comply with some, but not all of the standards and requirements set forth for the use set forth in § 59-G-2.58 for a telecommunications facility, as outlined in Part C, below.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or

the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

Conclusion: Petitioners' property is located in the 1997 White Oak Master Plan. The Plan does not contain any recommendations for telecommunication facilities or for this property and the surrounding area. However, the Plan "recommends that the evaluation of new special exception uses be based on their impact on the character and nature of the residential neighborhoods in which they are proposed." Exhibit 68, p. 3. Technical Staff concluded that the proposed facility was not compatible with the residential neighborhood because the "site is extremely narrow and does not offer appropriate buffers from the east to west property line in order to visually reduce the bulk of this tower and the support structure especially due to proximity to some of the adjoining houses where the greatest setback reductions are requested." Exhibit 68, p.3. For the reasons set forth in Part II.D of this report, the Hearing Examiner concurs with Technical Staff that the proposed special exception at this location is inconsistent with the recommendations of the 1997 White Oak Master Plan.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: Technical Staff advises that there are no uses or structures of similar height in the neighborhood. The neighborhood, as shown on the neighborhood map located on page 12 of the report, is densely residential. For the reasons stated in the previous

section, the Hearing Examiner concurs with Technical Staff that the proposed facility at this location will not be in harmony with the general residential character of the neighborhood because of the scale of the use in relation to the size of the property, the lack of appropriate buffers to minimize the visual impact of the structures bulk and the number of setback reduction request. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will not be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: For the reasons stated in the previous section, the Hearing Examiner finds that the proposed facility will be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that the special exception would cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. Exhibit 68, p. 7. The proposed facility will be unmanned and will generate no more than occasional trips for maintenance purposes, typically less than one visit per month. Technical Staff reported that “there are no discernible noise-related impacts associated with the proposed use, and the size, scale, and scope of

the proposed use are not likely to result in any traffic disruption or light intrusion.”

Exhibit 68, p. 5. Based on the evidence of record, the Hearing Examiner supports Technical Staff’s conclusion that the telecommunications facility will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity, and the Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: The proposed special exception use will not change the intensity of special exception uses in any substantial way. Technical Staff reported there were several special exceptions, mostly accessory apartment uses and the existing special exception use for a swim club on the Twin Farms property, within the staff-defined neighborhood. Technical staff concluded, “the limited impact of the telecommunications facility, which will produce no traffic, will not substantially increase the scope or intensity of special exception uses in the area.” Exhibit 68, p. 7. The Hearing Examiner finds that the proposed special exception will not increase the number, scope, or intensity of special exception uses in a way that will affect the area adversely.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that “while most telecommunication towers are constructed to fall inwards if collapsing, a potential hazard could exist if the adjacent tennis

courts were in use, as the tower is within 10 feet of the existing courts.” Exhibit 68, p. 7. The civil engineer confirmed that cell tower structures are designed to snap in half and not at the base of the tower, thereby reducing the fall radius. Tr. 124-127. However, the Petitioners did not supply any evidence to show the extent of the fall radius of the tower and its potential impact on the tennis courts. The Hearing Examiner concurs with Technical Staff’s concern that the proximity of the tower to the tennis courts poses a potential hazard when the tennis courts are in use, and finds that the Petitioner has failed to meet its burden of proof that the proposed use will not adversely affect the safety of those utilizing the club’s facilities.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: The evidence supports the conclusion that the proposed special exception would be adequately served by the specified public services and facilities, to the extent they are needed for this type of use.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
 - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception’s impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision. Exhibit 65 (a). Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (LATR) and Policy Area Mobility Review (PAMR). Technical Staff did do such a review, and concluded that the proposed use would add no additional trips during the peak-hour weekday periods and only one or two service trips per month for emergency repairs and or regular maintenance. Transportation Staff advised that while the existing swim club “might generate 30 or more existing peak-hour trips during the weekday morning and evening peak periods, a traffic study would not be required to satisfy the LATR test because no new peak-hour trips would be generated by the proposed wireless communication facility on the overall swim club site.” Staff further noted the “although developments located in the Fairland/White Oak Policy Area (White Oak Master Plan) must mitigate 45% of their new site-generated vehicular trips, PAMR trip mitigation is not required because the proposed special exception use generates fewer than three new peak hour trips, the minimum threshold for trip mitigation required in the current Growth Policy.” Exhibit 68, Attachment 5. Thus, the requirements of the LATR and PAMR are satisfied without a traffic study. By its nature, the site requires no school, water or sewer services. Technical Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or*

pedestrian traffic.

Conclusion: Based on the evidence of record, especially the Transportation Staff's conclusion that the proposed use "will have no adverse impact on nearby roadway conditions or pedestrian facilities," the Hearing Examiner so finds. Exhibit 68, Attachment 5.

C. Specific Standards

The specific standards for a special exception are found in Zoning Code §59-G-2.58. As outlined below, the evidence of record demonstrates compliance with some, but not all of the specific standards.

Sec. 59-G-2.58. Telecommunication facility

(a) Any telecommunication facility must satisfy the following standards:

(1) A support structure must be set back from the property line as follows:

A. In agricultural and residential zones, a distance of one foot from the property line for every foot of height of the support structure.

B. In commercial and industrial zones, a distance of one-half foot from property line for every foot of height of the support structure from a property line separating the subject site from commercial or industrial zoned properties, and one foot for every foot of height of the support structure from residential or agricultural zoned properties.

C. The setback from a property line is measured from the base of the support structure to the perimeter property line.

D. The Board of Appeals may reduce the setback requirement to not less than the building setback of the applicable zone if the applicant requests a reduction and evidence indicates that a support structure can be located on the property in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, if any, and visibility from the street.

Conclusion: Technical Staff, after considering the location, topography and existing vegetation found that "when evaluated alone, this reduction request would likely be supported because of the topography and tree line (with additional evergreen plantings) would

effectively reduce the visual impact from the street.” However, Technical Staff did not support the reduction request stating “that since eight other reductions to the dwelling setbacks are requested, staff has concluded that this tower cannot be located on this property in a way that it will be less visually obtrusive to the nearby residential properties.” The Hearing Examiner concurs with Technical Staff’s conclusion. Based on the evidence of record and for the reasons stated in Section II.B, the Hearing Examiner would recommend that the Board deny Petitioner’s request to reduce the setback requirements pursuant to §59- G-2.58(a)(1)(D), to allow the cell tower to be erected 109.4 feet from the southern property line instead of the required 125 feet.

(2) *A support structure must be set back from any off-site dwelling as follows:*

- A. *In agricultural and residential zones, a distance of 300 feet.*
- B. *In all other zones, one foot for every foot in height.*
- C. *The setback is measured from the base of the support structure to the base of the nearest off-site dwelling.*

D. *The Board of Appeals may reduce the setback requirement in the agricultural an[sic] residential zones to a distance of one foot from an off-site residential building for every foot of height of the support structure if the applicant requests a reduction and evidence indicates that a support structure can be located in a less visually obtrusive location after considering the height of the structure, topography, existing vegetation, adjoining and nearby residential properties, and visibility from the street.*

Conclusion: As set forth in Section II.B. of this Report, the Petitioners have not met their burden of proving the waiver is justified because the evidence presented shows that the facility was located to serve the owner’s needs and cannot meet the minimum required setbacks. Petitioners here are asking for eight waivers of the 300-foot setback requirement. Two of those waivers would allow reductions of the setback by 115 feet (from Lots 1 and 2), and other waivers would allow setback reductions of 72 feet (from Lot 3), 11 feet (from Lot 4), 76 feet (from Lot 11), 25 feet (from Lot 13), 6 feet (from Lot 14) and 3 feet (from Lot 15). What Petitioners are essentially asking is that

they be allowed to place the support structure in a location without regard to the dictates of the Zoning Ordinance and as if there were no requirement of a 300-foot setback. Because granting Petitioners extreme waiver requests would eviscerate the protections for neighboring properties intended by the statutory setback, the Hearing Examiner recommends that Petitioners' eight (8) requests for a reduction in the 300-foot setback be denied.

(3) *The support structure and antenna must not exceed 155 feet in height, unless it can be demonstrated that additional height up to 199 feet is needed for service, collocation, or public safety communication purposes. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection, pursuant to the building permit, the applicant must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure, as authorized in the building permit.*

Conclusion: The support structure will be 125 feet in height. Thus, the proposal meets this requirement.

(4) *The support structure must be sited to minimize its visual impact. The Board may require the support structure to be less visually obtrusive by use of screening, coloring, stealth design, or other visual mitigation options, after considering the height of the structure, topography, existing vegetation and environmental features, and adjoining and nearby residential properties. The support structure and any related equipment buildings or cabinets must be surrounded by landscaping or other screening options that provide a screen of at least 6 feet in height.*

Conclusion: As discussed in Part II.C of this Report, the proposal does not meet this requirement because the proposed facility is too close to the surrounding dwellings and property lines to meet the standards set forth in the Zoning Ordinance.

(5) *The property owner must be an applicant for the special exception for each support structure. A modification of a telecommunications facility special exception is not required for a change to any use within the special exception area not directly related to the special exception grant. A support structure must be constructed to hold no less than 3 telecommunications carriers. The Board*

may approve a support structure holding less than 3 telecommunications carriers if:

(A) requested by the applicant and a determination is made that collocation at the site is not essential to the public interest; and

(B) the Board decides that construction of a lower support structure with fewer telecommunications carriers will promote community compatibility. The equipment compound must have sufficient area to accommodate equipment sheds or cabinets associated with the telecommunications facility for all the carriers.

Conclusion: The property owner, Twin Farms Club, Inc., is a co-petitioner. The facility will be capable of supporting three telecommunications carriers. Exhibit 68, p. 2.

(6) No signs or illumination are permitted on the antennas or support structure unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.

Conclusion: No signs or illumination are proposed, except the two square foot sign required by subsection (8). Should the Board determine to approve the special exception, the Hearing Examiner recommends a condition, proposed by Technical Staff, to add the phrase "No Parking" to the required sign.

(7) Every freestanding support structure must be removed at the cost of the owner of the telecommunications facility when the telecommunications facility is no longer in use by any telecommunications carrier for more than 12 months.

Conclusion: Should the Board determine to approve the special exception, the Hearing Examiner recommends a condition requiring removal by Petitioners if the facility is not used for more than one year.

(8) All support structures must be identified by a sign no larger than 2 square feet affixed to the support structure or any equipment building. The sign must identify the owner and the maintenance service provider of the support structure or any attached antenna and provide the telephone number of a person to contact regarding the structure. The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.

Conclusion: The required sign will be installed and a condition so stating is recommended in Part V

of this report if the special exception is granted. Exhibit 17 (a).

(9) *Outdoor storage of equipment or other items is prohibited.*

Conclusion: No outdoor storage of equipment is proposed. Equipment will be enclosed as described elsewhere in this report.

(10) *Each owner of the telecommunications facility is responsible for maintaining the telecommunications facility, in a safe condition.*

Conclusion: A condition requiring that Petitioners maintain the facility in a safe condition is recommended in Part V below if the special exception is granted.

(11) *The applicants for the special exception must file with the Board of Appeals a recommendation from the Transmission Facility Coordinating Group regarding the telecommunications facility. The recommendation must be no more than 90 days old, except that a recommendation issued within one year before June 22, 2010, must be accepted for one year from the date of issuance. The recommendation of the Transmission Facility Coordinating Group must be submitted to the Board at least 5 days before the date set for the public hearing.*

Conclusion: A TFCG recommendation of approval, conditioned on approval by the Board of Appeals for a special exception and a reduction in setback requirements, dated May 4, 2011, was filed herein as Exhibit 7 (see also Exhibits 17 (a) and 77 (a)). It was less than ninety (90) days old when the petition was filed on June 22, 2011.

(12) *The Board must make a separate, independent finding as to need and location of the facility. The applicant must submit evidence sufficient to demonstrate the need for the proposed facility.*

Conclusion: There is no evidence in this case which controverts the need for the facility, but the Hearing Examiner finds that, while a need for the facility may exist, the proposed location does not meet the general and special standards for a special exception under § 59-G-1.21 and § 59-G- 2.58.

(b) Any telecommunications facility special exception application for which a public hearing was held before November 18, 2002 must be decided based on the standards in effect when the application was filed.

Conclusion: Not applicable.

(c) Any telecommunications facility constructed as of November 18, 2002 may continue as a conforming use.

Conclusion: Not applicable.

D. Additional Applicable Standards

Section 59-G-1.23. General development standards.

(a) Development Standards. Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.

Conclusion: This petition falls under the exception because Zoning Ordinance §59-G-2.58 specifies the development standards for telecommunications facilities. As discussed above, the proposed use does not meet all of the development standards required in §59-G-2.58.

(b) Parking requirements. Special exceptions are subject to all relevant requirements of Article 59-E.

Conclusion: Technical Staff did not recommend any parking for the proposed facility because it will require only one or two service visits per month.

(c) Minimum frontage. In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:

* * *

(5) Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.

Conclusion: No waiver is needed because the subject site meets the 25 foot at the street line

minimum frontage requirement in the R-200 Zone. In any event, the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of Section 59-G-1.21.

(d) Forest conservation. If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.

Conclusion: According Technical Staff, the property is exempt from submitting a forest conservation plan (Exhibits 68, p. 4).

(e) Water quality plan. If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.

Conclusion: The property is located in the Upper Paint Branch Special Exception Area and is subject to the impervious surface restrictions of § 59-C-18.152 of the Environmental Overlay Zone. As a result, Petitioner was required to and did submit an approved Preliminary/Final Water Quality Plan with the special exception application. According to Environmental Staff, the water quality plan was reviewed and conditionally approved by DPS on April 12, 2011 (Exhibits 65 (a) and Exhibit 9) and the Planning Board on September 15, 2011 (Exhibits 65 (a)). The conditions of approval are as follows:

1. Total impervious surfaces within the SPA will be no more than 33.33%, as shown on the *Impervious Surface Plan Portion of the SPA Water Quality Plan* submitted on August 24, 2011. Any modifications to these plans which increase site imperviousness may require a revision to the SPA

Water Quality Plan and a Planning Board approval.

2. Applicant will conform to the conditions as stated in Montgomery County Department of Permitting Services (DPS) Water Quality Plan approval letter dated April 12, 2011.

The proposed special exception application is consistent with the SPA Water Quality Plan.

(f) *Signs. The display of a sign must comply with Article 59-F.*

Conclusion: As indicated earlier in this report, the only sign on the facility will be the two square foot sign required by the special exception.

(g) *Building compatibility in residential zones. Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: The proposed telecommunications facility is in a residential zone. For the reasons set forth in previous sections, the Hearing Examiner finds that this requirement has not been met because the proposed location is not compatible or well related to the surrounding area.

(h) *Lighting in residential zones. All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

(1) *Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

(2) *Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: The subject site located in the R-200 zone. The proposed facility will not be illuminated. Exhibit 17 (a).

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2818 for a special exception to construct and operate a telecommunications facility, including a 125-foot tall monopole, designed as a flagpole, and related equipment, at 1200 Fairland Road, Maryland, be **DENIED**, and I further recommend that the Board of Appeals deny Petitioner's eight (8) requests for a reduction in the 300-foot minimum setbacks and their request for a 17-foot reduction from the minimum setback from the southern property line.

In the event that the Board elects to grant the special exception, the Hearing Examiner recommends the following conditions:

1. The Petitioners shall be bound by all of the exhibits of record, and by the testimony of their witnesses and the representations of counsel identified in this report.
2. At the completion of construction, before the support structure may be used to transmit any signal, and before the final inspection pursuant to the building permit, the Petitioners must certify to the Department of Permitting Services that the height and location of the support structure is in conformance with the height and location of the support structure as authorized in the building permit.
3. The telecommunication facility must display a contact information sign, no larger than two square feet, affixed to the outside of the equipment enclosure. This sign must identify the owner and the maintenance service provider and provide the telephone number of a person to contact regarding the installation. The sign will include the phrase "No Parking". The sign must be updated and the Board of Appeals notified within 10 days of any change in ownership.
4. There must be no antenna lights or stroboscopic lights unless required by the Federal Communications Commission, the Federal Aviation Administration, or the County.
5. There must be no outdoor storage of equipment, except equipment specified in the Site Plan.
6. Each owner of the telecommunications facility is responsible for maintaining the facility in a safe condition.
7. The facility shall be available for co-location of up to three carriers.
8. The telecommunications facility must be removed at the cost of the owner of the telecommunications facility when the facility is no longer in use by any telecommunications carrier for more than 12 months.

9. Petitioners must obtain a Hazmat Use Permit for the subject site before commencing operations.
10. Petitioners must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and the entire premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: November 21, 2011

Respectfully submitted,

Tammy J. CitaraManis
Hearing Examiner